Dominion Law Reports

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A NEW ANNOTATED SERIES OF REPORTS COMPRISING EVERY CASE REPORTED IN THE COURTS OF EVERY PROVINCE, AND ALSO ALL THE CASES DECIDED IN THE SUPREME COURT OF CANADA, EXCHEQUER COURT AND THE RAILWAY COMMISSION, TOGETHER WITH CANADIAN CASES APPEALED TO THE PRIVY COUNCIL

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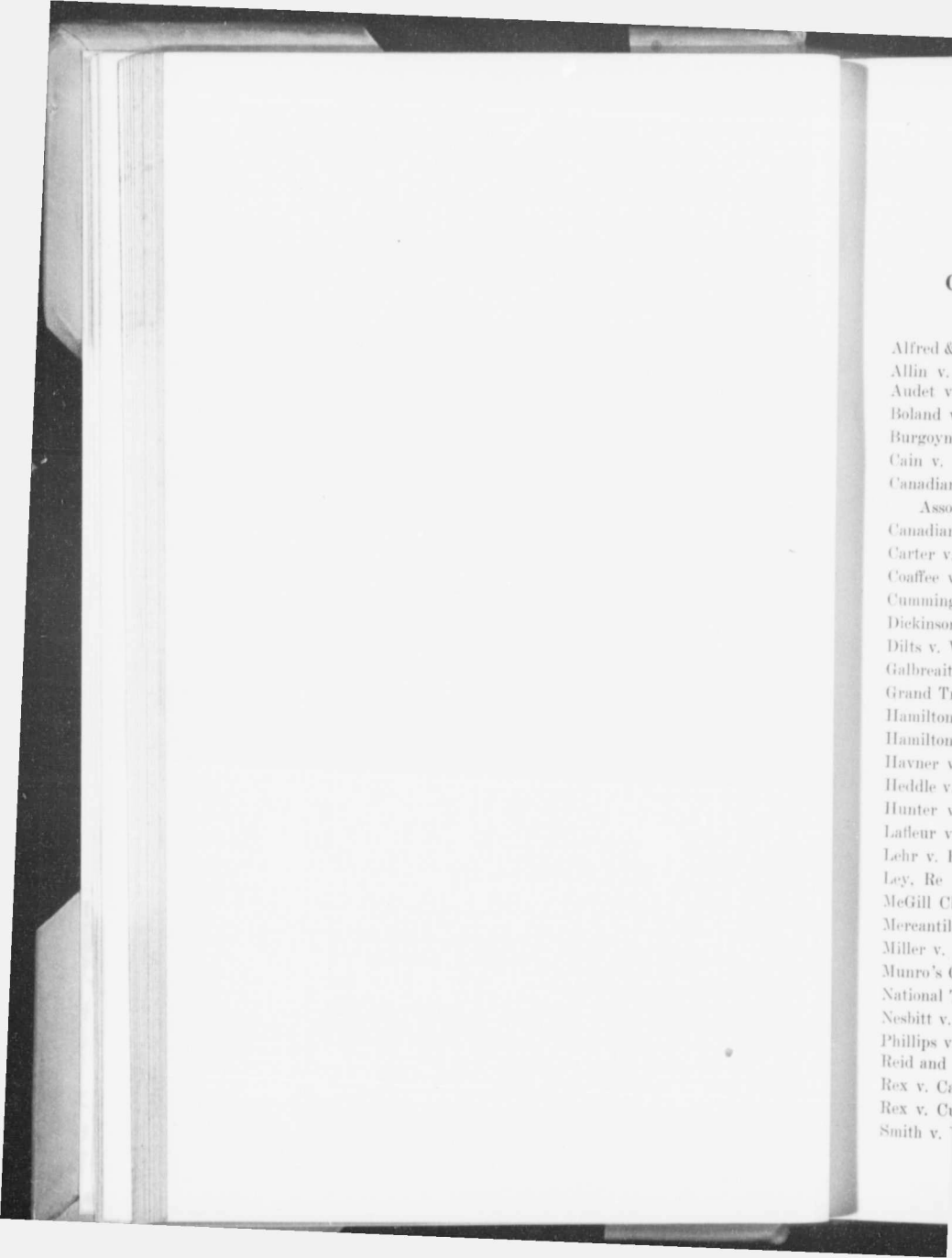

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June 28.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Galliher, JJ.A. June 28, 1912.

1. TRUSTS (§ II A—41)—WHO MAY BE APPOINTED TRUSTEE—CESTUI QUE TRUST.

A *cestui que trust* may be one of the trustees of an estate in whom the fee is vested, without his equitable estate necessarily being merged in the legal estate held by him *qua* trustee.

[Lewin on Trusts, 12th ed., 936, referred to.]

2. WILLS (§ III G 2—126)—DEVISE TO HUSBAND—LIFE ESTATE—TRUSTEES' POWER TO SELL—INCOME.

An equitable estate only is vested in a husband by a devise to him for life of the use of real property of which he, and others, were made trustees, clothed with power to sell it at discretion, and directed to invest the proceeds, particularly where, in the event of the property being sold during the lifetime of the husband, there was a direction to pay the income therefrom to him for life, and after his death to a daughter for her life, with remainder to her children, and the trustees were further directed, in the event of the property not being sold during the lifetime of the husband, to sell it at his death and to invest the proceeds and pay the income therefrom to designated legatees, since the powers and duties imposed upon the trustees made it convenient, if not necessary, that they should hold the legal estate.

[*Richardson* v. *Harrison*, 16 Q.B.D. 85, referred to.]

3. WILLS (§ III B—81)—DESCRIPTION OF BENEFICIARIES—MEANING OF HEIRS—ESTATE IN FEE SIMPLE IN REMAINDER—ESTATE TAIL.

In a devise of the use of real property to the testator's husband for life, with remainder to his heirs, with the exception of an interest of the value of $6,000 therein, which, at the death of the husband, was devised to a daughter for life, with remainder to her children, the word "heirs" means general heirs, and the husband under the devise took a life estate only in the $6,000 interest, while he took in remainder an estate in fee simple in the property, and the daughter took an estate tail expectant in such $6,000 interest.

4. WILLS (§ III G 5—140)—DEVISE OF INCOME UPON DEATH OF LIFE TENANT—REMAINDER TO DEVISEE'S CHILDREN—PURCHASERS.

Where, upon the death of a life tenant, the income of a fund was payable to a child of a testator for life, with remainder of the corpus to her children, the latter take as purchasers.

[*Shelley's Case*, 1 Rep. 88, specially referred to.]

5. WILLS (§ III L—199)—CONSTRUCTION—GIFT MODIFIED BY SUBSEQUENT CLAUSE—INCONSISTENT CLAUSES.

Where a testamentary gift is modified by a subsequent clause of a will, or is in conflict therewith, the latter clause controls.

[Jarman on Wills, 6th ed., 565, and *Constable* v. *Bull*, 3 DeG. & S. 411, referred to.]

6. WILLS (§ III G 7—150)—DIRECTION FOR SALE BY TRUSTEES—INVESTMENT OF PROCEEDS—"PROCEEDS" OF INVESTMENT—INCOME—INTENTION.

Where a testator directed that upon the sale of land by his testamentary trustees they should invest the proceeds, and that the "proceeds" of the investment should be paid to designated persons, the word "proceeds" will be construed as meaning income, since such was obviously the intent of the testator.

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7. WILLS (§ III A—76)—BEQUEST OF PROCEEDS OF INVESTMENT—IMPLIED GIFT OF CORPUS.

An absolute gift by bequest of the proceeds of an investment will constitute a gift by implication of the *corpus*, where the will clearly shews that such was the testator's intention.

8. WILLS (§ III G 2—125)—DEVISE TO HUSBAND FOR LIFE—INCOME FROM PART TO DAUGHTER—AFTER DEATH OF DAUGHTER DIRECTION TO SELL—DIVISION AMONG CHILDREN—FEE SIMPLE.

Where a devise gave the use of real estate to the husband of the testator for life, and at his death the income from a $6,000 interest to a daughter, and further provided that upon the death of the latter the property should be sold and the proceeds divided among her children, the devisees or heirs of the husband, upon his death, will take a fee simple estate in his interest in the property, which by the death of the daughter will be divested in favour of her children.

Statement

THIS is an appeal from the judgment of Murphy, J., on an application before him for the opinion of the Court upon the construction of the will of Matilda Ley, deceased. By her said will she devised lot No. 19:—

> To my trustees and direct that my trustees preserve the same to the use of my husband (John H. Ley) during his life and thereafter to the use of my daughter Annie Crowston, wife of Alexander Crowston, in a $6,000 interest, the property to be valuated and the interest ascertained by my said trustees during her life, remainder to the heirs of her body and the balance of remaining interest in said property to the use of the heirs of the said John H. Ley until such time as my trustees or the survivor of them shall sell the said property which they shall be at liberty to do at any time as they think advisable. I direct that my trustees shall invest the proceeds . . . The proceeds of any such investment to be paid or held by the said John H. Ley or the said Annie Crowston or the heirs of her body or the heirs of the said John H. Ley as such may be ascertained by my said trustees.
>
> I direct that *thereupon* my trustees shall pay the proceeds of such investments to my said husband John H. Ley during his life and after his death to pay such proceeds to my said daughter Annie Crowston during her lifetime, and at her death to pay the proceeds thereof equally divided to the children of the said Annie Crowston share and share alike.
>
> Should the said lands and premises be retained by my trustees as aforesaid at the death of my husband and my said daughter then I direct that my surviving trustees shall forthwith sell the said property and convert the same into money and to invest the same and pay the income thereof to my said daughter's children until the youngest of such children comes of age, thereupon I direct that my trustees shall realize upon such investments and divide the proceeds thereof share and share alike among the children of my said daughter Annie Crowston.

The appeal was allowed.

C. Killam, for appellant.

D. Armour, for respondent.

J. L. G. Abbott, for official guardian.

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Macdonald, C.J.A.

MACDONALD, C.J.A.:—The learned trial Judge was of opinion that the rule in *Shelley's Case*, 1 Rep. 88,* does not apply to the gift to the husband. He thought that because the husband is one of the trustees to whom the legal estate is devised, his life estate therefore, must be a legal one, while that limited to his heirs is an equitable one. It is not without hesitation that I have come to the conclusion that the life estate of the husband is an equitable one. That hesitation is not because of the devise of the legal estate to the husband as one of the trustees, as I think a *cestui que trust* may be made one of the trustees without thereby merging his equitable estate in the legal estate held *qua* trustee. There was not a union of two estates in the same person in the same right: Lewin on Trusts, 12th ed., 936. My doubt was rather as to whether the devise being for the use of the husband that use was not immediately executed in him upon the death of the testratrix so as to make his life estate a legal one wholly without reference to his being one of the trustees. Had there been no powers and duties vested in the trustees which would make it convenient, if not necessary, that they should continue to hold the legal estate, the use could properly be considered as executed in J. H. Ley, but having regard to the power of sale and the directions respecting the investment of the proceeds and disposition of the income which might, in the discretion of the trustees, be exercised in the husband's lifetime, as well as after his death, coupled with the trusts in favour of the daughter and her children, which trusts to be properly executed require that the legal estate should be vested in the trustees, and there being no re-devise or re-devises to the trustees in the will, I think the intention was that the legal estate should continue in them: *Richardson* v. *Harrison*, 16 Q.B.D. 85, and in this view it follows that the life estate of the husband was an equitable one, as was also the limitation to his heirs.

But apart from this rule, the learned Judge held that the word "heirs" was used in this will not in its strict legal sense, but as denoting a particular person or class of persons, I cannot find anything in the will to support this view. To my mind there is nothing to indicate any particular person or class as distinguished from the heirs general of the husband. In this view of the case it follows that under the first uses declared in the will, the husband took a life estate in the "$6,000 interest" and the fee simple in the balance, and that Annie Crowston took an estate tail expectant on the death of her father in the $6,000 interest.

*An exhaustive explanation of the "Rule in Shelley's case," and a review of the English and American authorities upon that subject, will be found in Vol. 29, L.R.A. (N.S.), pp. 963-1170.

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RE LEY.

Macdonald, C.J.A.

But these estates were subject to be divested by one of two alternative executory gifts. The first, in case of the sale of the property before the death of the husband and daughter, in which event, as I read the will, the husband's estate would be cut down to one for life in the whole property, Annie Crowston would take the whole for life, after the death of her father, with remainder to her children as purchasers. To arrive at this result, two repugnant clauses in the will must be considered, and the true intention of the testratrix arrived at.

The first directs that upon such a sale and investment:—

> The proceeds of such investment (are) to be paid or held by the said John H. Ley or the said Annie Crowston or the heirs of her body, or the heirs of the said John H. Ley, as their interest may be ascertained by my said trustees.

If this stood alone I should have no hesitation in considering it as continuing the previous estates, but it is followed by a clear and imperative direction which alters the previous gifts, and being posterior to the clause quoted above which conflicts with it, must be held to modify the earlier directions, in the manner above stated. In Jarman on Wills, 6th ed., at p. 565, it is said that:—

> It has become an established rule in the construction of wills that where two clauses or gifts are irreconcilable so that they cannot possibly stand together, the clause or gift which is posterior in local position shall prevail, the subsequent words being considered to denote a subsequent intention.
>
> For instance, if a testator in one part of his will gives to a person an estate of inheritance in lands or an absolute interest in personalty, and in a subsequent passage unequivocally shews that he means the devisee or legatee to take a life interest only, the prior gift is restricted accordingly.

See also *Constable* v. *Bull*, 3 DeG. & S. 411, 18 L.J. Ch. 302, 13 Jur. 619, and other authorities cited in support of that statement.

The testatrix directs payment, of the "proceeds" of the investments, to the life tenants when it is obvious that she used that word in the sense of income, and used the same word in the grant to the children, but it does not matter whether she used it in the latter case in its proper sense or as meaning income, because an absolute gift of the income in circumstances like the present is by implication a gift of the corpus, whether the income be derived from land or personalty: Jarman on Wills, 6th ed., pp. 1185 and 1297.

The other alternative executory devises arise only in case the property should remain unsold at the death of the husband and daughter, and he being dead, it now means at the daughter's

death. In that event no difficulty arises. Up to that time the husband's heirs or devisees retained their interest in fee, and Annie Crowston her estate tail. Thereafter those interests are divested by the devises which then take effect in favour of the children of Annie Crowston.

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RE LEY.

IRVING, J.A.:—I concur. Irving, J.A.

GALLIHER, J.A.:—I concur. Galliher, J.A.

Appeal allowed.

VANBUSKIRK v. McDERMOTT.

N. S.
S. C.
1912
May 10.

Nova Scotia Supreme Court, Russell, Drysdale and Ritchie, JJ. May 10, 1912.

1. ESTOPPEL (§ III J—125)—GRANTEE UNDER QUIT CLAIM DEED—RIGHT IN RESPECT TO WARRANTY IN PRIOR DEED.

Where the plaintiff, after the death of one from whom he obtained title to land, with warranty, discovered that the grantor had only a life interest and a mortgagee's title thereto, and informed the executrix, as well as the remainder-men, that he had a right of action against them on the warranty, but that rather than have difficulty he would give them $250 for a quit-claim deed of their interest in the land, which was refused, but subsequently, upon the plaintiff threatening to foreclose the mortgage and bring an action against them on the warranty, they executed and delivered him such deed upon the payment of $500, the plaintiff not suggesting that he reserved or intended to reserve any further claim against them, he cannot subsequently maintain an action against them on the warranty.

2. APPEAL (§ III F—98)—EXTENSION OF TIME—REVIEW OF ON APPEAL OF MAIN ACTION.

Where notice was not given in proper time of an appeal from an order of a Judge in Chambers extending the time to appeal from the judgment at the trial, and no appeal was specially taken from such order, the Court hearing the principal appeal will not review the propriety of the extension order upon an objection that the principal appeal, apart from such order, is made too late. (*Per* Drysdale, J.)

[*Belden* v. *Freeman*, 21 N.S.R. 106, specially referred to.]

3. APPEAL (§ VII H—340)—APPEAL FROM TRIAL JUDGMENT—INTERLOCUTORY ORDERS NOT SPECIALLY APPEALED FROM.

An appeal from the trial judgment does not reopen interlocutory orders based on material that could not be before the trial Judge. (*Per* Drysdale, J.)

[Compare *Windsor, Essex and L.S.R. Co.* v. *Nelles* (No. 1), 1 D.L.R. 156, 159; *Windsor, Essex and L.S.R. Co.* v. *Nelles* (No. 2), 1 D.L.R. 309, and *Nelles* v. *Hesseltine; Windsor, Essex and L.S.R. Co.* v. *Nelles* (No. 3), 2 D.L.R. 732.]

Statement

APPEAL from the judgment of Meagher, J., in favour of plaintiff in an action to recover damages for breach of warranty of title. The judgment appealed from proceeded on the ground that plaintiff was deceived by defendant's testatrix in connection with the purchase of the land in question, and had a clear right

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S. C.
1912
VANBUSKIRK v. MCDERMOTT.
Statement

of action, and the proof to deprive him of it should be clear and definite.

The defendant's appeal was allowed and the action dismissed with costs.

Plaintiff obtained a deed of land with a warranty of title from defendant's testatrix, who had only title as mortgagee and a life estate, the remainder being in defendant and her sister. Plaintiff with full knowledge of his rights threatened action on the warranty, but "rather than go to trouble" offered to pay the sum of $250 to defendant and her sister on condition that they would execute a quit claim deed. Defendant made a counter-offer to execute the deed asked for upon payment by plaintiff of the sum of $500. This offer was accepted by plaintiff and the deed was thereupon executed and delivered and the money paid.

Argument

March 18, 1912. *Mellish*, K.C., in support of appeal:—Plaintiff forced defendants to sign the quit claim deed by threatening them with an action on the warranty in the deed from their mother. He offered them $250 to release their interest, which they refused, saying that they would not take less than $500. This amount plaintiff paid and after obtaining the quit claim deed from defendants sued upon the warranty in their mother's deed.

F. L. Milner, contra.:—Defendants are too late in bringing their appeal: *Belden* v. *Freeman*, 21 N.S.R. 106, 119; *In re Coles*, [1907] 1 K.B. 1; *The Gratia*, 28 Times L.R. 49. Plaintiff offered the $250, saying that was all he would give, and the inference was that he would sue on the warranty if he had to go higher than that: *Baron* v. *Baron*, 2 Jones (Irish Reports) 226; *Barton* v. *Bank of N. S. Wales*, 15 A.C. 379. The question in this case is one of fact, and the learned trial Judge has found in our favour.

Mellish, K.C., replied.

Drysdale, J.

DRYSDALE, J.:—The defendant is devisee and executrix under the will of Catherine McDermott deceased. It seems that Catherine McDermott in her lifetime sold a piece of real estate to plaintiff, giving him a conveyance containing a warranty of title. In fact, she had only a mortgagee's title and a life interest, the remainder on expiration of her life interest being vested in her daughters, the defendant and her sister Minnie.

After the death of Catherine McDermott, the plaintiff, being about to sell the real estate, so purchased by him, discovered the defect in his title, and he thereupon proceeded to Sydney, N.S., where defendant and her sister reside, with the object of perfecting his title, taking a solicitor, Mr. Carter, with him. Interviews were had with defendant's sister and her husband and also with defendant's solicitor. Nothing definite came from the

verbal negotiations in Sydney at that time. The plaintiff then informed defendant that he had an action on the warranty, and unless he got a deed from defendant and her sister he would put the claim in force, and defendant's solicitor seems to have been suggesting a claim defendant had on account of some dealings between her mother and plaintiff. Nothing was accomplished in Sydney, and plaintiff and his solicitor returned home to Moncton. From this time on the dealings and transactions are disclosed in correspondence between the parties. It opens with a letter from defendant's solicitor under date of June 1st, setting up a claim by defendant against plaintiff by reason of some alleged dealings with defendant's mother and offering to execute a quit claim deed if plaintiff was willing to pay a decent sum, and suggesting $1,000 as the amount. To this plaintiff's solicitor replied by wire under date of June 3rd as follows:—

> Vanbuskirk will give $250. That is his limit.

This wire was followed by a letter from Carter, the solicitor, in which he says plaintiff positively will not increase his offer above $250, and stating further:—

> I presume we will have to take action by foreclosing the mortgage and on the warranty contained in the late Mrs. McDermott's deed.

This was followed by a wire from Carter to defendant's solicitor under date of 6th June, in words as follows:—

> Vanbuskirk refuses to advance on offer. If quit claim not forwarded immediately his sale of property is off.

This was replied to by a letter from defendant's solicitor under date of June 7th, in which he again sets up the Mrs. McDermott claim against plaintiff and suggests an offer of $500 on the part of plaintiff as reasonable. To this letter plaintiff's solicitor replied by wire, "Will give the $500. Have quit claim executed, etc., etc." Under date of June 16th this offer was accepted, a quit claim deed executed and duly forwarded attached to a draft for the amount named. The draft was paid by plaintiff and the transaction apparently closed.

Since then, however, the plaintiff, notwithstanding the negotiations referred to, asserts in this action that his claim on the warranty is still outstanding against defendant, and that he has a right to recover back from her the $500 so paid, as well as expenses.

I think such a claim is not well founded. The plaintiff, with a full knowledge of his rights, was threatening action on the warranty and with full knowledge of rival claims urged by defendant, voluntarily offered $250 "rather than go to trouble," as he himself expresses it. He notifies defendant through his solicitor that if this offer of $250 is not accepted and a quit claim deed executed, action would be taken on the warranty.

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v.
MCDERMOTT.

Drysdale, J.

He afterwards raises this offer to $500. It is accepted by defendant and the quit claim deed executed, and all this without any suggestion that the plaintiff is reserving or intending any further claim on defendant. It was conceded, and properly so, on the argument before us, that if defendant had accepted plaintiff's offer of $250 no further action would lie, and I am unable to see how any action arises by reason of the mere fact that he saw fit to raise his offer from $250 to $500.

I am of opinion the plaintiff's action herein fails, that the appeal ought to be allowed, and the action dismissed with costs.

It was urged before us on this argument that notwithstanding the plaintiff was too late in serving a notice of appeal against the order of Mr. Justice Graham extending defendant's time for appealing, and that there was no special appeal from that order before us, still it was open to plaintiff on this appeal to question the propriety of the said order of Mr. Justice Graham. Whilst an appeal from a trial Judge necessarily involves more than the mere decision of the case, and includes all rulings and orders made during the trial, I do not think it can be successfully argued that such an appeal opens up interlocutory orders based on material that could not be before the trial Judge, nor can it be said to open up orders made after the trial based on the special material that must have been before the Judge who granted the extension in this case, and which could not come before us except on a special appeal directed against such extension. *Belden* v. *Freeman*, 21 N.S.R. 106, was cited as an authority for plaintiff's contention in this regard, but I cannot so consider it.

Russell, J.

RUSSELL, J.:—The plaintiff's own statement shews that the transaction began with a threat from him to enforce his warranty if he did not get a quit claim deed. He told one of the sisters that he had an action on the deed and that unless it was signed he would "put it into force." Putting the same thing in another form, he told them he had a chance at the will, as he had a warranty deed from their mother. The argument for the defendant seems to be that while he used this leverage to secure a quit claim deed from the sisters for nothing, he was going to retain his action on the warranty if he had to pay for their title. But it was their title that was the only thing that constituted a breach of the warranty, and it is inconceivable that he was to pay them for that title and immediately recover back the value of it in an action. If this were really the legal effect of the transaction, it would be strong evidence in itself of such imposition as would require very slight additional incidents to set aside the transaction. But the case may not be sufficient for that as it stands and there was no necessity to invoke that remedy. The correspondence shews that the right of action on the war-

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ranty was included in the settlement, or, rather, that one of the very purposes of the negotiations was to put an end to the right of action. The sisters were claiming that the plaintiff had overreached their mother when obtaining the deed of the property, or in connection with the transfer. But for this they would apparently have been willing to part with their rights for nothing. They offer through their solicitor to take $1,000. His solicitor replies:—

> Mr. Vanbuskirk positively will not increase his offer above $250, so I presume we will have to take action by foreclosing the mortgage and on the warranty contained in Mrs. McDermott's deed.

I understood counsel to concede that if the $250 had been accepted it would have been a settlement of the whole matter. Whether so or not, it seems clear to me that this was what was meant and that the plaintiff could not, after the $250 had been accepted, have turned round and sued on the warranty. The offer was not accepted. On the following day a counter offer of $500 was made which the plaintiff immediately agreed to. There was no change whatever in the meantime of the basis of the negotiations. It seems absolutely clear that the whole matter proceeded on the basis of a settlement of the plaintiff's claim on the warranty, and it is the intention of the parties that must govern the agreement. It is a slight circumstance that the warranty was not released, but I do not regard the circumstance as important. I can easily imagine myself overlooking that formality. A solicitor might easily overlook it without being very dull.

RITCHIE, J., concurred. Ritchie, J.

Appeal allowed and action dismissed.

COAFFEE v. THOMPSON.

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Manitoba King's Bench, Mathers, C.J.K.B. July 9, 1912.

1. VENDOR AND PURCHASER (§ I C—13*a*)—RIGHT OF PURCHASER TO CONVEYANCE WITHOUT RESTRICTIONS—NON-DISCLOSURE PRIOR TO AGREEMENT.

One who agrees to purchase land is not obliged to accept a conveyance containing building restrictions, where none were mentioned by the vendor prior to the making of the agreement of sale, and no restrictions were contained in the documents evidencing the agreement.

Statement

THE plaintiffs Coaffee and Martin brought this action for specific performance of a contract of sale of property situate on Balmoral street close to Broadway, Winnipeg.

The defence set up was that it was a term of the agreement that no building erected on, or to be erected on, any part of the

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land should be used for any other purpose than that of a private dwelling or apartment block, and that no building for use as a dwelling or apartment block should be erected nearer than 23 feet from the line dividing the lot from Balmoral street, and should be of not less than $3,000 value; and that plaintiffs had always refused to be bound by the terms of the agreement with regard to the building restrictions and had demanded from the defendants a conveyance without any restrictions whatever.

J. B. Coyne and *S. R. Laidlaw*, for the plaintiffs.

J. E. O'Connor, K.C., and *W. S. Morrissey*, for the defendants.

Mathers, C.J.

MATHERS, C.J.K.B.:—Further consideration has but confirmed the impression I entertained at the trial that the plaintiffs are entitled to succeed. I find as a fact that the defendant did not stipulate for building restrictions until after he had agreed to sell the land in question to the plaintiffs. I cannot accept his explanation of the omission of all mention of restrictions in the receipt which he gave for the deposit and which specified the other terms. He had the day before the sale quoted his price and terms to Liddle, his agent, without any mention of restrictions.

It was only after Liddle had closed a sale to the plaintiffs and accepted from them a deposit of $50, that the defendant for the first time told his agent that he did not want a garage, work-shop or stable built on the land. He was then informed by Liddle that he had no authority to close with restrictions. After this he delivered a receipt written by himself embodying the terms of sale, but containing no allusion to restrictions. The defendants were informed by Liddle what the defendant had said about a garage, workshop or stable and they assured him they had no intention of building such a structure. I am satisfied that up to this time nothing had been said about building back from the street line. This claim was first put forward when the conveyance was tendered for execution, and was then too late.

As the plaintiffs were always willing to agree that a workshop, stable or public garage should not be erected on the land, although not bound to do so, there will be judgment for specific performance subject to restrictions as to these only, with costs of suit.

Judgment for plaintiffs.

HEDDLE v. BANK OF HAMILTON.

B.C.

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June 4.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin and Galliher, JJ.A. June 4, 1912.

FINDER (§ I—1)—WALLET LEFT IN BANK FOUND AND HANDED TO ACCOUNTANT BY CLERK—ABSENCE OF CLAIM AS LOST PROPERTY.

A wallet intentionally placed by one of a bank's customers on a desk furnished for their use, and forgotten by him, is not lost within the meaning of the rule of law giving title to lost property to the finder, and was under the protection of the bank, and a clerk of the bank who picked it up and at once turned it over to a superior officer of the bank without stating that he would claim it if the owner were not found, is not, as against the bank, entitled to the money in the wallet upon its remaining unclaimed for nearly four years.

[*Heddle* v. *Bank of Hamilton*, 19 W.L.R. 897, affirmed on appeal.]

Statement

APPEAL by plaintiff from the judgment at trial in favour of defendant, *Heddle* v. *Bank of Hamilton*, 19 W.L.R. 897, by the County Court of Victoria, Judge Grant presiding.

The appeal was dismissed.

The facts of this case were not in dispute. The plaintiff was a clerk in the defendant's employ, and noticing a wallet on the desk provided for the use of customers of the bank in that portion of the bank premises used by customers, came from behind his desk, picked up the wallet, and found it contained $800 in money, which he counted and then had his count checked over by the accountant. He appears to have left the money with his superior as a matter of course, and without any statement that he would make claim to it as the finder, should the owner not be discovered. The defendant advertised for claimants, but none appeared. This occurrence was in November, 1907, and no claimant having appeared, this action was brought in October, 1911. There is evidence that perhaps as early as 1909 the plaintiff asserted his right to possession of the money. The learned County Court Judge held that in these circumstances the wallet could not be said to have been lost as that term is understood in law; that it was intentionally placed on the desk by the owner and forgotten; and hence was within the defendant's protection, or the protection of its banking house. He, therefore, dismissed the action.

J. M. Price, for plaintiff.

Douglas Armour, for defendant.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—In *Bridges* v. *Hawkesworth*, 21 L.J. Q.B. 75, 15 Jurist, 1079, at p. 1082, Patteson, J., delivering the judgment of the Court, and referring to notes picked up from the floor of a shop by a stranger, said:—

> The notes never were in the custody of the defendant (the shop keeper) nor within the protection of his house before they were found, as they would have been if they had been intentionally deposited there.

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There are no cases in our own or in the English Courts to indicate the character of the intentional deposit mentioned above, but a number of such cases have been before the Courts in the United States. The general result of these is stated in Cyc. vol. 19, p. 539, quoted by the learned Judge:—

> A thing voluntarily laid down and forgotten is not lost within the meaning of the rule giving the finder title to lost property, and the owner of a shop, bank or other place where the thing has been left is the proper custodian rather than the person who has happened to discover it, and rather than all other persons except the owner.

I think the fair presumption is that the wallet was intentionally placed on the desk by the owner of it while there on business with the bank; that he forgot to pick it up, and while it is true, as evidenced by his not returning for it, that he appears never to have afterwards recollected where he had placed it, yet in the first instance the placing of it upon the desk was his voluntary act, and any one seeing it there in a position which would rather rebut than suggest loss, ought to regard it as under the protection of the house. At all events, it seems to me that the plaintiff, a servant of the bank, seeing it there, should consider it to be within such protection, and I think it was his duty to hand it over to the custody of the proper officers of the defendant, as he did. The evidence of what he did at that time would bear the inference that he was acting, not as a stranger in the bank, but as one of its servants. He made no claim to possession of the wallet. It was not he, but his superiors, who were at the expense of advertising the find, and I do not think that either the plaintiff or the defendant regarded the relationship between them as that of bailor and bailee.

I think, therefore, the appeal ought to be dismissed, but in the circumstances, and having regard to the somewhat doubtful question of law involved, I trust the defendant will not ask for costs.

Irving, J.A.

IRVING, J.A.:—I would dismiss this appeal.

The case of *Bridges* v. *Hawkesworth*, 21 L.J.Q.B. 75, 15 Jur. 1079, we are told stands by itself, and on special grounds. It is not necessary to re-state the facts of that case, but that decision is not an authority where the banknotes have been left on a table or desk provided for the use of customers, and where the person picking them up was an employee of the bank.

The general principle as stated by Lord Russell in *South Staffordshire Water Co.* v. *Sharman*, [1896] 2 Q.B. 44, at p. 47, is in favour of the defendants. There can be no doubt that the manager of the bank had a power and intent to exclude unauthorised interference with any articles placed upon the tables or desks in the bank building. In other words, articles left on the desks or tables are within the protection of the house.

Mr. Heddle does not give much information as to the circumstances connected with the finding of this money.

He goes to work at 9 a.m. He found it before noon some time. He cannot remember whether or not there was any person in that part of the bank or not at the time he found it. It was on the round desk in the centre of the business part of the bank. He was in his part of the bank when he saw it.

There must have been an interval between the time of first noticing the wallet and the time of picking it up, and during that interval it must have become apparent to Mr. Heddle that the wallet was lost—if lost is the proper word to apply—otherwise Mr. Heddle would not have felt at liberty to walk out from his post and pick it up.

Now, during that interval, if some person—say a newsboy selling papers, or a beggar—some person whose appearance would in itself forbid the idea that he was the owner of the wallet—were to come into the bank, and after an interval pick up this wallet, would not Mr. Heddle have said, "Leave that alone," or reported the matter to the manager? I think he would. I think that would have been his duty, and that satisfies me that this wallet was under the protection of the house.

Holmes, in his work on Common Law, cites *McEvoy* v. *Medina*, 87 Am. Dec. 735, where it was held that a barber had a better right to a pocket book which had been left on the barber's table than had the finder. The opinion pronounced by the Court is rather obscure, but the learned author seems to think that the Court was of opinion that the barber had possession as soon as the owner left the shop.

Kincaid v. *Eaton*, 98 Mass. 139, is also cited by Holmes. Here again the language of the judgment is uncertain. It may be read as implying that what is called the public part of a bank is public only for certain specified purposes.

That is the ground that I would rest my decision on. For in my opinion one of the public who is admitted for the purpose of doing business with the bank taking possession of an article which he finds on a bank counter, by so doing exceeds the right or privilege given to him.

MARTIN, J.A. (oral):—I would dismiss the appeal. Martin, J.A.

GALLIHER, J.A. (oral):—I agree entirely in the reasons so clearly and ably set out by the learned County Court Judge. The appeal should be dismissed. Galliher, J.A.

Appeal dismissed.

MAN.

K. B.

1912

June 15.

TOWN v. KELLY.

Manitoba King's Bench. Trial before Prendergast, J. June 15, 1912.

1. PARTNERSHIP (§ VI—29)—ACCOUNTING BETWEEN PARTNERS—AGREEMENT AS TO DISSOLUTION—ACTION TO WIND-UP.

In an action for winding-up a partnership for a defined term, if it appears that, before the expiration of the term, the partners mutually agreed upon a dissolution, upon the terms that the defendant should take over the assets and liabilities, and should agree to employ the plaintiff as manager of the business, and that such agreement was acted upon, the plaintiff cannot succeed, even though the parties did not finally agree as to all the assets, but left the disposition of some of them to depend upon the employment agreement.

2. EVIDENCE (§ II E 1—140)—ONUS OF SHEWING THAT PARTNERSHIP AT WILL TERMINATED.

In an action for winding-up a partnership, if the partnership be at will, the onus is on the plaintiff to shew by what acts the partnership was terminated.

3. EVIDENCE (§ II E 1—140)—CONTINUANCE OF PARTNERSHIP FOR FIXED TERM.

In an action for winding up a partnership made for a fixed term, the onus is upon the defendant who sets up a dissolution by agreement during such term, to prove the same.

Statement

THE plaintiff brought this action to have dissolved and wound up a partnership formed between himself and the defendant under articles in writing dated June 15, 1907, for the purpose of carrying on business under the firm name of Kelly & Town, as brick makers, at the city of St. Boniface.

The defence, while admitting that there was a partnership under the said agreement, was substantially to the effect that on May 5, 1910, when the three years' term provided by the agreement for the duration of the partnership lacked but a few weeks of completion, the parties agreed to end and did dissolve the same, the defendant taking over all the assets and assuming all the liabilities of the firm; and that on that day the plaintiff became and remained until December 1st, the defendant's yard manager on a monthly salary with a certain additional remuneration based on the quantity and cost of bricks manufactured under his supervision during that time and a half interest in the balance of the wood on the plant after the season's burning was over.

The action was dismissed.

J. C. Collinson, for plaintiff.

A. C. Galt, K.C., for defendant.

Prendergast, J.

PRENDERGAST, J.:—It appears on the evidence that on April 13, 1910, when the partnership was drawing to a close as stated, the defendant wrote to the plaintiff (Ex. 7) reminding him of the clause in the articles that in the event of dissolution either party could make an offer to sell his share or buy the share of

the other partner, and asking him to consider what course he would take.

It appears that the plaintiff then asked Mr. Ferrise, the firm's bookkeeper, for a statement of the accounts to date. The books were apparently not in very good shape; but the statement which the plaintiff got, at all events satisfied him that the business had been run at a loss. It would also appear that he was very much in debt to the firm, as a note of some $14,000 which he had put in the business at the start was only reduced at that time by some $4,000.

The parties met at the end of April with their minds well made up, as I find, to let the partnership expire by effluxion of the period provided for its duration, which would be but a few weeks later. I have no doubt that the parties then clearly intimated that common intention to each other.

The winding-up, however, had yet to be effected, and the time of the year was almost come when operations with the large plant should be resumed. The defendant, having before him a written memorandum from which he says he read from time to time, then made to the plaintiff a verbal proposition to the effect that the firm be wound up by his (the defendant's) taking over the assets and assuming the liabilities, and that the plaintiff become his manager until December following, on certain terms and conditions to be hereinafter stated. This was followed by considerable conversation in the course of which, it is alleged by the defendant, the plaintiff acquiesced to the terms proposed. The plaintiff, however, suggested that the proposal be put in the definite form of an agreement.

A few days later, the defendant sent the plaintiff a draft of agreement (Ex. 2), dated May 5, 1910. The preamble is as follows:—

> Whereas the parties hereto are carrying on business at the City of Winnipeg and the Town of St. Boniface, in the Province of Manitoba, as brickmakers, under the name, style and firm of Kelly & Town, and are desirous of defining the terms upon which the said partnership shall be dissolved;
>
> And whereas the said firm is subject to certain liabilities and amongst its assets has a large quantity of cordwood available for the purpose of manufacturing brick, and also certain plant, machinery, teams, etc.

The *habendum* provides that the defendant is to take over all the assets and assume all the liabilities, and that the plaintiff

> shall until the 1st day of December, 1910, continue to superintend the manufacturing of brick for the said Thomas Kelly and that in the making of the said brick the said cordwood shall be used as far as possible.

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Then, the plaintiff's remuneration is in substance fixed as follows: a monthly salary of $150, and "on the assumption that the said Town shall manufacture Five Million (5,000,000) good merchantable brick (which the said Town agrees to do), the said Town shall receive Five Thousand Dollars ($5,000.00) in addition if the cost thereof to the said Kelly shall be the base price of Six Dollars ($6.00) per thousand",—subject to the condition that he be entitled to an increase of $1,000, or subject to a deduction of $1,000 for every 50c. of increase or decrease of said base price of $6.00 per thousand, and to proportionate reductions and increases. There are also provisions to the effect that for every 1,000 brick burnt there shall be charged against the same for wood used, the sum of $2.50; that horses that are used are to be charged at the rate of $1.00 per head per day used, and that the wages of drivers shall also be charged against the brick making account at the amount paid out.

The last paragraph reads as follows:—

> Any wood of that now on hand remaining over after burning the five million brick to be manufactured before the said first day of December, 1910, shall be equally divided between the said Town and the said Kelly, or, at the option of the said Kelly, he may pay the said Town in cash the equivalent of the wood at its then market price in the said yard.

The plaintiff, after referring this last agreement to his solicitors had another one prepared (Ex. 8), which he submitted on May 28th to the defendant's solicitors.

Except in specifying what should be taken into account in fixing what was called the base price or base cost, I do not see that the two drafts differ materially. With reference to what expenses should be included in the base price, the plaintiff's draft is much more explicit and detailed; it may be that the defendant's draft, construed in the light of custom and reason, would include practically the same items, and it may be that their effect differs most materially. With reference to the price of the wood to be charged against the base price, and which was put in the defendant's draft at $2.50 per 1,000 brick, the same was put in the plaintiff's draft at $1.25 at first; but I find, on the evidence, that the plaintiff consented to a change in this respect, substituting himself $2.50 in pencil to the typewritten figures $1.25.

As to dividing the wood left after the season's operation, the provision in the plaintiff's draft reads as follows:—

> Any wood now on hand remaining over after burning the brick manufactured as provided by this agreement during the season of 1910, shall, after the first day of December, 1910, be equally divided between the said Town and the said Kelly or at the option of the said Kelly, the said Kelly may purchase from the said Town his one-

half interest in the said wood remaining over at the then market price of the said wood in the said yard and shall pay for the same in cash.

After the plaintiff submitted his draft on May 28th, as stated, there was correspondence (Ex. 14 to 19) between the parties' solicitors, the defendant being away at the time. A few days later, however, the defendant came back, and told the plaintiff in the course of a conversation which they then had, that his draft was child's work or a child's agreement, intimating thereby that he would not adopt it.

The plaintiff during all that time had been superintending the manufacturing of the brick, and continued to do so until December following, when he left for British Columbia. He had been receiving $150 a month, and also got, as I understand, about $400 above that. Before leaving, he claimed from the defendant $7,000, which he admits was "only guess-work," and which the defendant refused. The plaintiff after that did not take any part or interest in the running of the plant or the concern in general.

I must say that there cannot be much significance attached to the fact that the plaintiff acted as superintendent of the yards and received $150 monthly all that season; for, under the partnership agreement, he also had the management of the yards, and was also drawing $150 a month pending the closing of the yearly accounts. Nor do I attach much importance to the manner of entering the plaintiff's salary in the books of the company at Winnipeg during what I will call the disputed term; for I think it is shown that he did not at any time keep track of them, although he admits that he was quite free to do so.

I must find, however, that the partnership was dissolved and wound up at the end of April, 1910, which the parties considered virtually the end of the three year term provided for the duration of the partnership although it had another month and a half to run, as the season for that business was just opening.

I find so on the following grounds: 1st, the partnership was not a partnership at will as set out in the statement of claim, which would throw on the defendant the onus of showing by what act of the parties it was terminated. Clause 1 of the articles, dated June 15th, 1907, provides that,—"The partnership . . .shall be a partnership for three years from this date." It would be dissolved by the mere effluxion of time, unless the parties expressly or impliedly agreed otherwise, as to which the onus is on the plaintiff.

2nd. The defendant's letter (Ex. 7) already referred to, is a clear intimation of his intention to let the partnership expire at the end of the three years.

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3rd. When the parties met at the end of April, I have no doubt that this was the common intention. What they met for was to determine which partner should "sell his share or buy the share of the other partner" under clause 17, or how the assets and liabilities should otherwise be disposed of. That this was their frame of mind is shewn by the drafts of agreement prepared by the plaintiff and defendant respectively, which both purport, taking the coming dissolution for granted, to be merely for the purpose, as stated in the preamble, of "defining the terms upon which the said partnership shall be dissolved."

4th. That the defendant should take all the assets and assume all the liabilities is also the substance of the two drafts as to winding-up,—although his taking in the wood with the assets was made subject to a certain reservation or qualification, which I shall refer to later.

5th. The defendant's statement that the plaintiff agreed to the said terms of dissolution and to the employment agreement at this April meeting, is corroborated by his son Robert E. Kelly, and the firm's bookkeeper Ferris. Robert E. Kelly says that on the occasion in question, he went into the office where his father and the plaintiff had been discussing the matter for about twenty minutes and the former said to him in the latter's presence, that he was taking over the assets and liabilities and Town would start in May superintending the yards on a salary together with the remuneration stated, and that Town apparently acquiesced. Ferris says that he understood from the plaintiff that he was "working by the thousand after April," and that it was because he so understood that he charged his salary against the brick-making account.

6th. The pay sheets prepared by the plaintiff from April to December shew that he, also, charged his salary against the brick making account.

7th. On December 1st, the plaintiff left for British Columbia and has not since assumed to exercise any control or take any part in the business.

8th. When upon leaving, the plaintiff claimed from the defendant $7,000 in settlement as aforesaid, his mind was to do so under the employment agreement on his own shewing, for he says this in evidence: "I just guessed at the $7,000. He wouldn't discuss it. . . . I said before leaving the office that I would have it *settled on a partnership basis if he didn't settle it otherwise*. . . . I worked out the $7,000 according to bricks made and sales made and the wood used."

Now, with reference to the wood which I have referred to, I think that in this respect the terms of the winding-up must be considered together with the agreement of employment,—that is to say, that under the latter, the plaintiff would have a

certain contingent interest in the balance of the wood remaining unused on December 1st. That interest would perhaps be larger if the base price of manufacturing is to be construed as in the plaintiff's draft and less if construed according to the defendant's. I am not called upon to define the employment agreement and surely will not hold that the base price referred to in the April conversation is to be made up in the light of the defendant's draft. I leave this an open question.

It is sufficient for the determination of this issue that I should find as follows: The parties were resolved when they met in April to leave the partnership articles to their operation, that is, that the partnership should dissolve by the effluxion of time, and they agreed to consider the three years as then lapsed as they were for all practical purposes, for the reasons already stated. They agreed that the winding-up should be effected by the defendant taking over the assets and assuming all the liabilities, except that with respect to the wood on hand it should be made subject to and considered in the terms of employment. Those terms of employment were that the plaintiff should become the defendant's yard manager on a monthly salary with further remuneration depending mainly on the base cost of the brick, and according to results the plaintiff might have, or not have, an interest in the wood remaining. I cannot hold that what the base price would be made up of, was specifically defined. I simply hold that it was made in those words one of the terms of the employment agreement, that those terms seemed to them definite enough to act upon, and that the parties considered that the partnership was there and then wound up and the employment begun which is further evidenced by the plaintiff's conduct from that day to December 1st following.

The action will be dismissed with costs.

Action dismissed.

ALLIN v. FERGUSON et al.

Saskatchewan Supreme Court, Lamont, J., in Chambers. May 4, 1912.

1. SOLICITORS (§ II B—28)—AUTHORITY OF SOLICITOR TO ACT FOR BOTH PARTIES—ABSENCE OF ADVERSE INTERESTS.

A solicitor who acted for the plaintiff in a mortgage foreclosure proceeding, may act for a defendant therein, where it appears that the interests of the two parties are not adverse, or that the interest of the plaintiff in the subject-matter of the litigation has ceased.

2. SOLICITORS (§ II B—28)—SUBSEQUENT MORTGAGEE—SOLICITOR ON RECORD OF FIRST MORTGAGEE—ADVERSE INTEREST.

A motion on behalf of a subsequent mortgagee to obtain payment from the proceeds of the sale of the encumbered property under a prior mortgage, will be denied where the motion was made by the solicitor of record of the plaintiff in the foreclosure proceedings, without it appearing that the rights of the two mortgagees were not adverse, or that the plaintiff's interest in the litigation had ceased.

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3. MOTIONS AND ORDERS (§ I—4)—AFFIDAVIT FILED SUBSEQUENT TO SERVICE OF NOTICE OF MOTION.

An affidavit which was not filed until after the service of a notice of motion which stated that a filed affidavit of a named deponent would be read in its support, cannot, without leave, be read on the hearing of the motion as it does not answer the description given by the notice which specified the affidavit as one already filed.

4. MOTIONS AND ORDERS (§ I—3)—SERVICE OF NOTICE OF MOTION BY POSTING UP IN LOCAL REGISTRAR'S OFFICE.

A notice of a motion, on behalf of a subsequent mortgagee, to obtain payment out of the proceeds of the sale of encumbered property which had been paid into Court, cannot be served upon the mortgagor and the other defendants by filing a copy of the notice of motion in the office of the Local Registrar.

5. COURTS (§ I A—2)—JURISDICTION OF LOCAL MASTER—RIGHT TO SEARCH RECORDS FOR MATERIAL NECESSARY TO SUPPORT MOTION.

Where, on a motion by a subsequent mortgagee to obtain payment from the proceeds of sale of mortgaged premises which had been paid into Court, there was no abstract of title shewing that the applicant was prior in title to the other defendants, the motion was properly denied, since the Local Master was not obliged to search the records of the office of the registrar for material necessary to support the motion.

6. OFFICERS (§ II C—89)—CUSTODY OF OFFICIAL DOCUMENTS.

A local registrar cannot permit official documents to be taken from his office except under an order of the Court.

Statement

THIS is an appeal from the decision of the Local Master for the judicial district of Cannington refusing an order for payment out of Court to the Moose Mountain Lumber Company of moneys alleged to be in Court by virtue of an order *nisi* made in a sale proceeding under a mortgage in this action.

The appeal was dismissed.

P. H. Gordon, for appellant.

F. W. Turnbull, for respondent.

Lamont, J.

LAMONT, J.:—The Moose Mountain Lumber Company were, it is said, subsequent mortgagees. In the action H. A. Archer was the solicitor on the record for the plaintiff the mortgagee. The order also directed a sale of the mortgaged lands and a payment into Court of the proceeds of the sale after the plaintiff's claim was satisfied. On April 11th, 1912, a notice of motion, not addressed to anyone (R. 614) was drawn up and signed by H. A. Archer as solicitor for the Moose Mountain Lumber Company. At the bottom of the notice of motion was the following:—

> Take notice that in support of the above motion will be read the affidavit of J. A. Thompson and exhibits thereto and the affidavit of Peter McLaren filed.

The notice of motion stated that the Local Master in Chambers would be moved on Tuesday, the 16th day of April, 1912, for an order for payment out of Court to the applicants the Moose Mountain Lumber Company of sufficient of the money in Court to the credit of this cause to satisfy its claim under its mortgage

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and costs. When the matter came before the Local Master he refused to entertain the application because in his opinion the solicitor for the plaintiff could not in the same action be the solicitor for the defendant. From this order the applicants appealed.

I am of opinion that under the circumstances of this case the ruling of the Local Master was right. I, however, do not wish to be understood as holding that under all circumstances a solicitor acting for a plaintiff in a foreclosure matter may not properly act for a defendant. The general rule is that it is the duty of the solicitor, growing out of the relation between himself and his client, to devote all his skill and diligence to the interest of his client. He cannot act, therefore, for an adverse party in the same suit even though his motives are honest: 4 Cyc. 920. If, however, it is made to appear that the interest of a particular defendant and the interest of the plaintiff are not adverse, or if the interest of the plaintiff in the subject-matter of the litigation has ceased, the act of the plaintiff's solicitor in making a subsequent application in the same action for a defendant may not be inconsistent with the duty he owes to the plaintiff. In this case, if the material before the Local Master had shewn that the plaintiff's claim had been satisfied and he had no further interest in the litigation, I am of opinion that the fact alone that the solicitor who appeared on behalf of the applicant for payment out was the solicitor who had acted for the plaintiff would not be sufficient to prevent his making the application. But the material before the Local Master did not shew anything of the kind. According to the notice of motion, the material to be read on the motion was "the affidavit of J. A. Thompson and exhibits thereto and the affidavit of Peter McLaren filed." The affidavit of Thompson merely verifies a mortgage made by the defendant, Ferguson, and the amount due the applicants thereunder. There was no affidavit of Peter McLaren which had any bearing on this application filed at the time the notice of motion was served. There was an affidavit of his, filed subsequently, to the effect that certain monies had been paid into Court by the plaintiff in this action. This affidavit not being filed at the time the notice of motion was served, cannot be the affidavit referred to in that notice and therefore cannot be read. There was, therefore, no material before the Local Master shewing that a sale had been held under the order *nisi*, or that the plaintiff's claim had been satisfied, or even that there was any money in Court to be paid out. In addition to these fatal omissions, the application is open to other objections equally fatal:—

(1) The notice of motion was served upon the mortgagor and all other defendants with three exceptions by filing a copy in the office of the Local Registrar. Just how this would bring

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to the mortgagor a knowledge of the fact that the applicants were proving a claim against him under their mortgage and applying for payment thereof it is difficult to see. Yet it is clear that the mortgagor was entitled to be present on such an application and, if he desired, question the validity of the applicants' mortgage or the amount due them thereunder. The fact that these defendants did not appear in answer to the plaintiff's writ of summons does not give any subsequent incumbrancer on an application for payment out a right to serve a notice of motion otherwise than in the regular manner.

(2) There was no abstract of title shewing that the applicants were prior in title to the other defendants. It was argued that there was in the files of the Local Registrar at Arcola in this matter an abstract of title shewing the priority of the various defendants, and that the file had been praeciped from the office of the Local Registrar at Arcola and was now before me. A bundle of papers purporting to be the file in this case is here, but there is no evidence that these papers were before the Local Master when the application appealed from was made to him. The Local Master is under no obligation to go to the office of the Local Registrar and there search among the files of that office in order to ascertain if there is any material which would support the notice of motion, and further, I know of no rule which allows a Local Registrar to hand out the official documents in his office to any solicitor who may ask for them unless he produces an order of the Court therefor. These papers, not being before the Local Master, so far as the material shews, cannot be looked at by me on this appeal.

The appeal will, therefore, be dismissed with costs.

Appeal dismissed.

Annotation

Representation of adverse interests by same solicitor.

Annotation—Solicitors (§ II B—28)—Acting for two clients with adverse interests.

As it is the duty of a solicitor while managing his client's affairs to use reasonable skill and learning, to apply due diligence and attention thereto, and to act therein with fidelity and good faith, he cannot, regardless of his motives, act for another person at the same time whose interests clash with those of his client: *Ex parte Philip*, 26 N.B.R. 178; *Fraser* v. *Halifax and Cape Breton R. Co.*, 18 N.S.R. 23, 6 Can. L.T. 138; *Boulton* v. *Don and Danforth Road Co.*, 1 Ch. Chamb. (Grant's) 329; *Re Charles Stark Co.* (No. 2), 15 P.R. (Ont.) 471; *Powell* v. *Powell*, [1900] 1 Ch. 243, 69 L.J. Ch. 164, 82 L.T. 84.

As it is the duty of an attorney, growing out of the relation between himself and his client, to devote all his skill and diligence to the interests of his client, he cannot act for the adverse party in the same suit, even though his motives are honest: 4 Cyc. 920.

An attorney may not represent adverse interests, or undertake the discharge of inconsistent or conflicting duties; after having been retained

Annotation (*continued*)—Solicitors (§ II B—28)—Acting for two clients with adverse interests. Annotation

Representation of adverse interests by same solicitor.

by one party he cannot, without a plain violation of his professional duty, attempt to represent any party or interests which are opposed to those of his client, or receive any compensation from either party: 3 Am. and Eng. Encyc. Law, 295.

But in non-litigious matters there can be no objection to the same solicitor being employed by all parties. Thus, the interests of lender and borrower do not necessarily clash, and where they do not the same solicitor may properly act for both: *per* Tindal, C.J., in *Doe d. Peter* v. *Watkins*, 3 Bing. N.C. 421, at p. 424; 3 Hodges 25, 4 Scott 155, 6 L.J.C.P. 107, 1 Jur. 42, 43 R.R. 701.

A solicitor in such cases must, however, act *bonâ fide* towards both parties. Thus, where one of two men, both the clients of the same solicitor, gives the solicitor written authority to sell certain real estate and the solicitor enters into a contract with his other client to sell the same to him, there is a necessity for good faith and openness of dealing on the part of the solicitor, and if he fails in this regard as to the vendor the Court will refuse the purchaser specific performance of the contract: *Hesse* v. *Briant*, 6 DeG. M. & G. 623, 5 W.R. 108.

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Ontario Divisional Court, Falconbridge, C.J.K.B., Britton, and Riddell, JJ. May 23, 1912.

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May 23.

1. APPEAL (§ VII L 3—498)—REVIEW OF FINDINGS AS TO AMOUNT OF DAMAGES.

An assessment of damages by a trial Judge for the flooding of lands will not be disturbed on appeal, notwithstanding the appellate Court might, on the evidence, have reached a different conclusion.

2. COSTS (§ II—28)—HIGH COURT SCALE—DAMAGES WITHIN INFERIOR JURISDICTION.

In an action for damages for flooding lands where the ownership of the land is not admitted, the Court properly ordered that costs be paid on the High Court scale, although the amount of damages recovered might have been within the jurisdiction of an inferior Court.

[*Cain* v. *Pearce Co.*, 2 O.W.N. 1496, 1498, affirmed on appeal; *McGrath* v. *Pearce Co.*, 2 O.W.N. 1496, 19 O.W.R. 904, affirmed on appeal.]

Statement

APPEALS by the defendants from the judgments of Teetzel, J., in these five actions: *T. Cain* v. *Pearce Co.*; *M. Cain et al.* v. *Pearce Co.*; *Bonter* v. *Pearce Co.*; *McGrath* v. *Pearce Co.*; *McMillan* v. *Pearce Co.*

The judgments appealed from (except in *McMillan* v. *Pearce Co.*) are reported in 2 O.W.N. 1496, 1498.

The appeals were dismissed.

E. F. B. Johnston, K.C., and *E. G. Porter*, K.C., for the defendants.

H. E. Rose, K.C., for the plaintiffs.

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RIDDELL, J.:—These are all actions for damages for overflowing lands. The four first-named were tried before Mr. Justice Teetzel at Belleville in March, 1910; that learned Judge gave written reasons for his judgment (*Cain* v. *Pearce Co.*, 1 O.W.N. 1133); and formal judgments were taken out accordingly, declaring: (2) that the defendants had wrongfully caused the waters of Crow river, etc., to overflow the lands of the plaintiffs; (3) "that the defendants, through themselves and their predecessors in title, have, by continuous user during the twenty years immediately prior to the commencement of this action, acquired an easement by prescription to pen back and flow the waters of Crow river, etc., over and upon the said lands of the plaintiffs to the extent and for the period during each year exercised and enjoyed by them with the old dam in the main channel and other dams then used by them in the three eastern channels, in the condition they were in during the five years immediately preceding the building of the new dam in 1893, but this Court is unable to define either the limits upon the plaintiffs' land to which this right to flow has accrued or the length of time each year that such flooding could be maintained;" (4) that the waters do not flow away so quickly as they did before the improved dam of the defendants; (5) that the plaintiffs are entitled to damages from six years before the tests of the writ, "but in ascertaining such damage no allowance shall be made for any damage for flooding the plaintiffs' land occasioned by the defendants or others in exercising the right of driving logs down Crow lake or Crow river under R.S.O. 1897 ch. 142, sec. 1;" (6) that the defendants pay said damages; (7) reserving the question of the amount of damages to be ascertained by Mr. Justice Teetzel or a Referee to be appointed; (8) reserving leave to apply for an injunction; (9) further directions and costs reserved until after damages ascertained.

An appeal was taken to this Divisional Court [*Cain* v. *Pearce Co.*, 2 O.W.N. 887, 18 O.W.R. 595], and we directed the *McGrath* case to be opened up and retried.

In the other three cases we struck out of the judgment, in the third clause, all the words, "but this Court is unable," etc., to the end of the clause. In the written reasons for judgment it was said (2 O.W.N. at p. 888): "The Referee will determine the extent of the easement, upon the evidence already given, and such further evidence, if any, as any party may adduce upon the reference." But neither party saw fit to have this direction inserted in the formal judgment.

In the *McGrath* case, we directed the costs of the first trial of the appeal, and of the new trial, to be in the discretion of the Judge or Referee before whom such new trial should be had

The four cases came on again before Mr. Justice Teetzel, and also the fifth case, *McMillan* v. *Pearce Co.* In the *McMillan* case the learned Judge found a cause of action proven; and, having assessed the damages at $80, he directed judgment to be entered for the plaintiff for $80 and High Court costs. In the *McGrath* case [*McGrath* v. *Pearce Co.*, 2 O.W.N. 1496, 19 O.W. R. 904], he found damages ($110) in respect of lot 8 and directed judgment to be entered for $110 and High Court costs, including the costs of the appeal, less the sum by which the costs had been increased by reason of the claim for lots 9 and 10. The learned Judge found damages to the amount of $150 in respect of part of lot 9 and $225 in respect of lot 10 and the rest of lot 9; but does not consider that the plaintiff is entitled to these sums.

In the three first-named cases, an assessment of damages was had, and the Judge found $600, $250, and $65—and directed judgment for these sums, with costs on the High Court scale.

The defendants now appeal. A difficulty arose at the outset of the argument as to the propriety of the appeal being brought before a Divisional Court, and it was agreed by all parties that the findings, etc., of Mr. Justice Teetzel should be considered findings, etc., made by him after a trial; that the matters might be heard by the Divisional Court; and the proper judgment entered up as a Divisional Court judgment.

I have read with care and considered all the material before my learned brother, and can find nothing of which the defendants can complain.

Much of the argument before us consisted of a complaint that the trial Judge did not define the easement of the defendants. But this is not asked for in the pleadings; it was not asked in the argument, voluminous as it was, addressed to the trial Judge; when we made a direction in the Divisional Court, "the Referee will determine the extent of the easement," neither party had it inserted in the judgment; it is not asked in the notice of the present motion; and we were not asked either to allow an amendment of the pleadings or to make a declaration without an amendment.

I think the defendants were well advised in not having the Divisional Court direction made part of the formal judgment —had they done so, no doubt the trial would have taken a different course not at all to their advantage.

From my examination of the evidence, I think that, taking the easement at the very highest that the evidence would at all justify, the learned Judge has been far from generous in his estimate of damages, particularly as, under Con. Rule 552, they are assessed to the date of the assessment.

The right to damages at all in the *McGrath* and *McMillan* cases is, in my view, clear.

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As to costs: in the first place, leave to appeal has not been given, and my learned brother informs me that he would not give it. But, in any case, the ownership of the land is not admitted, and judgment is properly ordered with costs on the High Court scale.

Pursuant to the arrangement, the judgments will be entered up as Divisional Court judgments—and the appeals will be dismissed with costs on the High Court scale.

Britton, J.

BRITTON, J.:—The learned trial Judge found: (1) that there was a liability on the part of the defendants to the plaintiffs Cain, Cain *et al*, and Bonter, for flooding their lands—a general reference was directed as to these; (2) that as to McGrath's lots 9 and 10 there was no damage, but there was some damage as to lot 8 and so a reference would be directed in the McGrath case as to lot 8; (3) subject to the learned Judge's special findings— "the damages to be ascertained upon the reference will be confined to the damages occasioned by flooding in excess of the extent to which the defendants were entitled by prescription when their new dam was constructed."

From this judgment defendants in the four cases appealed to a Divisional Court.

The Divisional Court judgment was given on the 14th March, 1911: *Cain* v. *Pearce Co.*, 2 O.W.N. 887, 18 O.W.R. 595.

That judgment re-opened the *McGrath* case, so McGrath was placed in the same position as the plaintiffs in other three actions.

The judgment of the trial Judge was varied by directing that the referee should determine the extent of the easement acquired by the defendants, upon the evidence already given, and such further evidence, if any, as any party may adduce upon the reference.

The learned trial Judge undertook the reference. In other words he continued the trial, no objection was taken to this, in fact, it was the wish of all parties, and with the consent of all that the learned Judge should see the defendant's dam, the plaintiff's lands and the streams of water which it is alleged occasioned the damage.

The *McMillan* case was not tried with the others at Belleville. The record was entered for May sittings in March, 1910, and at that sittings jury notice was struck out but time was postponed to autumn non-jury sittings, 1910, at Belleville. It stood until spring sittings, 1911, and then adjourned until 4th July, 1911, to be tried with the others, or to be dealt with upon the reference. On the 4th August, 1911, judgment was given for $80. On the 5th August, 1911, judgment was given in the other cases, for damages as follows:—

McGrath, $100; T. Cain, $250; M. Cain *et al.*, $600; Bonter, $65.

The judgment in the *McGrath* case is reported *McGrath* v. *Pearce*, 2 O.W.N. 1496, 19 O.W.R. 904, and the other cases follow.

From these judgments appeal is now taken by the defendants. The reference was really a trial of the McMillan claim, but from what took place with his consent and consent of the defendants his case may be considered with the others. The reference was a new trial as to McGrath. The position then is this: Liability of the defendants has been found by the trial Judge, and this liability has been affirmed by a Divisional Court. The only question is as to amount to each plaintiff, if any amount can be ascertained.

All the legal defences as to liability have been swept away except so far as applicable in determining the amount for which defendants are liable.

The *McGrath* case was opened so that if the evidence would warrant it plaintiff could recover for damage to lots 9 and 10.

The learned trial Judge has adhered to his former finding, disallowing anything for 9 and 10 and assessing the damages for lot 8 at $110. He assessed contingently the damages for 9 and 10, but there is no case made for recovery as to the latter amount. In assessing damages for any of the plaintiffs the learned Judge had a most difficult task, and especially difficult by reason of the restrictions and limitations laid down by himself in his trial judgment—an easement was found—as to flooding parts of lands in question. Damages were limited to certain years, and damages were further limited to those which were occasioned by the improved condition of defendants' dam by which water was permitted to flood lands to a greater extent and to retain longer upon the land then before the improved condition of the dam, etc., etc. To me the evidence as to the damages is vague, indefinite, uncertain and unsatisfactory. There is no possibility upon the evidence as presented by the stenographer to the Court to determine with any reasonable certainty the amount of damage sustained from the causes mentioned. Defendants are wrong in thinking, as apparently they do think, that stopping leaks in a dam will not affect higher lands after the water has risen above the top; but they are quite right in their argument and the evidence is very strong in support of the argument that the defendants ought not to be held liable, if after the dam was tightened, after all leaks stopped, there were opening in the dam made by removal of stop logs, more than sufficiently to make up for the tightening.

The sum of the matter is this: there was evidence of damage. The learned Judge has accepted this as sufficient to enable him to find in each case a specific sum. The learned Judge saw the

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dam, saw the lands in reference to which the alleged damage was said to have been done. He saw and heard the witnesses. The learned Judge apparently disregarded evidence that seems to me strong in favour of defendants' contention, and *vice versa*. That was his right. To disturb the finding, it is not enough that upon the evidence I would have reached a different conclusion. Could the trial Judge, upon the evidence, making such selections as he was entitled to make by reason of the qualification, the appearance, and the demeanour of the witnesses, reasonably have come to the conclusion now attacked? The findings of a Judge are entitled to at least as much weight as those of a jury, and so I reluctantly, upon my view of the evidence, agree that the motions must be dismissed and with costs as mentioned by my brother Riddell.

FALCONBRIDGE, C.J.:—I agree in the result.

Falconbridge, C.J.

Appeals dismissed.

CARTER v. FOLEY-O'BRIEN CO.
(And Two Other Actions.)

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March 20.

Ontario High Court, Middleton, J., in Chambers. March 20, 1912.

1. ACTION (§ II B—45)—CONSOLIDATION AT INSTANCE OF PLAINTIFF—SEVERAL ACTIONS BROUGHT AGAINST SAME DEFENDANT.

The Court will not order, at the instance of the plaintiffs, consolidation of actions brought by different plaintiffs against the same defendant upon claims that they were fraudulently induced to subscribe for shares in a company, where the alleged fraudulent statements were not covered by any common prospectus or other representation made generally to all of such plaintiffs as distinguished from the separate representations made to each of them.

2. ACTION (§ II B—45)—CONSOLIDATION—DIFFERENT PLAINTIFFS AGAINST SAME DEFENDANT.

Where several actions are brought by different plaintiffs against the same defendant, alleging that the plaintiffs were induced to purchase shares by fraudulent misrepresentations, consisting of oral statements made at different interviews, the case is not one for consolidation.

3. PLEADING (§ I J—65)—PARTICULARS—SUFFICIENCY OF REFERENCE TO PLEADINGS IN ANSWER TO DEMAND FOR PARTICULARS OF REPLY.

Where a statement of claim alleges fraudulent misrepresentations inducing the purchase of shares and the statement of defence sets up laches and acquiescence, and the reply alleges that the delay in bringing the action was caused by "further misrepresentations," it is not a satisfactory answer to a demand for particulars of the reply to say that such particulars are sufficiently set out in the reply, statement of claim, and particulars of the statement of claim already furnished.

4. DISCOVERY AND INSPECTION (§ IV—20)—INTERROGATORIES—RIGHT TO INTERROGATE AS TO MATTERS WHICH PARTY KNOWS NOTHING ABOUT.

Discovery is in aid of the case as pleaded, and the examining party has no right to interrogate for the purpose of finding out something of which he knows nothing now, and which may enable him to present a case of which he has no knowledge, and which he has not set up in his pleadings.

[*Hennessey* v. *Wright* (No. 2), 24 Q.B.D. 445(*n*), and *Yorkshire* v. *Gilbert*, [1895] 2 Q.B. 148, referred to.]

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5. PLEADING (§ I J—65)—PARTICULARS—WHEN THEY SHOULD BE ORDERED —PRIOR TO EXAMINATION FOR DISCOVERY.

A provision in an order for particulars that they may be given after examination for discovery is not proper where the facts must be within the knowledge of the party from whom the particulars are sought. That party may, in a proper case, obtain leave after discovery to deliver further particulars, but the case ought to be presented upon the pleadings and ancillary particulars before discovery is had.

Statement

APPEALS by the plaintiffs from orders of the Master in Chambers refusing consolidation of the three actions (brought by different plaintiffs against the same defendants) and also directing particulars of the statements of claim.

W. R. Smyth, K.C., for the plaintiffs.

G. M. Clark, for the defendant company and the defendant Geddes.

Middleton, J.

MIDDLETON, J.:—First, with regard to consolidation or other relief of that nature. Each individual plaintiff alleges that he has been defrauded into subscribing for stock by statements made to him by or on behalf of the defendants. These statements are not covered by any common prospectus, but consist of oral statements made in interviews.

While these statements in each case are similar, each individual case will have to stand or fall upon its own evidence, as it is not admitted that the statements were made upon any of the occasions giving rise to the litigation. It may be that a good deal of evidence will be common to the three actions; and, if the plaintiffs' solicitor chooses to enter the actions for trial together—as undoubtedly he should— the trial Judge will be amply able to avoid any unnecessary repetition of evidence. See *Williams* v. *Township of Raleigh*, 14 P.R. 50, and *Ryan* v. *Cameron*, 16 P.R. 235.

The real complaint of the plaintiffs is, that they think it will be necessary to have separate examinations for discovery in each of the three cases. So far as the examination is for the purpose of discovery, they could probably find out everything concerning the truth or falsity of the statements made or said to have been made, upon one examination; and, so far as they desire to ascertain the facts relating to the different conversations giving rise to the action, there is nothing in common. No doubt, when the examinations take place, there will be no necessity for repeating the common evidence; but, even if convenience indicated the propriety of the order sought, I am clear that there is no power to make it.

Then as to particulars, I am quite satisfied that the Master is right. The plaintiffs, as I have said, allege misrepresentation. The defendants, among other things, plead laches and acquiescence. The plaintiffs seek to avoid this by stating in their reply that the delay in the bringing of the action was caused by

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"further misrepresentation," which must mean misrepresentations other than those set up as the foundation of the original claim.

Upon particulars being demanded, an answer was served which is entirely unsatisfactory, as it states that the particulars "are sufficiently set out in the said reply and joinder in the statement of claim and in the particulars furnished"—i.e., particulars of the allegations in the statement of claim—"and the plaintiffs before examination are not able to furnish any further or better particulars than those indicated."

If the reply is founded upon fact, and is not a work of the imagination only, the plaintiffs must know what statements were made to them which induced them to delay bringing the action, and they ought to give this information before calling upon their opponents to answer.

Complaint was made as to the way in which costs were dealt with by the Master. I am not sure that I would have made the same order; but I certainly cannot interfere with the Master's discretion.

Upon the argument, I was asked to direct that the plaintiffs might give further particulars after examination. In some cases, where the facts are in the defendant's knowledge, such a provision would be entirely proper; but I do not think that the provision would be proper where the facts must be within the knowledge of the party pleading. If at a later stage the plaintiffs desire to give further particulars, and can make a proper case, they will secure relief, upon proper terms; but the case to be presented ought to be developed upon the pleadings and ancillary particulars before discovery is had. And it ought to be borne in mind that discovery is in aid of the case as pleaded, and that the examining party has no right to interrogate for the purpose of finding out something of which he knows nothing now, and which may enable him to present a case that he has no knowledge of and which he has not set up in his pleadings. See *Hennessey* v. *Wright* (No. 2), 24 Q.B.D. 445(*n*); *Yorkshire* v. *Gilbert*, [1895] 2 Q.B. 148.

Both appeals are, therefore, dismissed, with costs to the defendants in any event of the cause.

Appeals both dismissed.

SMITH v. YUKON GOLD COMPANY.

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July 22.

Territorial Court of the Yukon Territory, Macaulay, J. July 22, 1912.

1. JUDGMENT (§ II B—76)—CONCLUSIVENESS OF JUDGMENT DISMISSING ACTION FOR NON-COMPLIANCE WITH ORDER FOR COSTS—EFFECT OF PAYMENT AFTER JUDGMENT.

Where an action has been dismissed for non-compliance with an order for the payment of certain costs by the plaintiff, the Court has no power to restore the action to the list for trial upon the plaintiff's paying such costs.

[*Script Phonography Co., Ltd.* v. *Gregg*, 59 L.J. Ch. 406; *Whistler* v. *Hancock*, L.R. 3 Q.B.D. 83; *King* v. *Davenport*, L.R. 4 Q.B.D. 402; *Farden et al.* v. *Richter*, L.R. 23 Q.B.D. 124, referred to.]

Statement

AN application by special leave on behalf of the plaintiff on the 18th of July instant, for an order restoring this action to the trial list and fixing a day for the trial of the same, and that for such purpose the order dismissing this action with costs made on the 16th day of July for non-payment of the costs of the day of the 14th of May last, be rescinded and discharged upon payment by the plaintiff of the said costs of the day and such other costs as he may be directed to pay, the same to be paid forthwith, or for such other order as to the Court may seem meet.

The writ of summons in this action was issued and the statement of claim filed on the 16th day of June, 1911, and an amended statement of claim filed on the 30th day of June, 1911. The statement of defence was filed on the 6th day of December, 1911, and notice of trial of this action was given by Mr. J. P. Smith, the defendants' solicitor, on the 3rd day of May, 1912, for the 14th day of May following. The action coming on for trial on the 14th day of May last, an application was made to the Court by Mr. C. W. C. Tabor, counsel on behalf of the plaintiff, for a postponement of the trial and for leave to the plaintiff to amend his statement of claim, when it was ordered, among other things, that the trial of this action be postponed until Tuesday the 16th day of July, 1912, with leave to the plaintiff to make such amendment to his pleading as he might be advised, with a further order that the costs of and incidental to the application and to the postponement of the trial were to be paid by the plaintiff to the defendant before the 16th day of July, 1912, otherwise the plaintiff's action to be dismissed with costs.

The action having come on for trial before Macaulay, J., on the 16th day of July, 1912, and the plaintiff admitting that the costs ordered to be paid by the order of the 14th of May had not been paid as provided in said order, and that he was not now in a position to pay said costs, it was ordered that the action be dismissed with costs. On the same day the plaintiff, through his counsel, Mr. Macdonald, obtained special leave from the same Judge for this motion to be heard on the 18th day of

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July, counsel stating, on the application for leave, that in the meantime plaintiff had succeeded in obtaining the money to pay the costs as provided in the order of the 14th of May, and asking that upon such payment the action be restored to the trial list.

Charles Macdonald, for plaintiff.

F. T. Congdon, K.C., and *J. P. Smith*, for defendant.

MACAULAY, J.:—On examining the authorities I am unable to find anything to warrant me in granting the application of the plaintiff. On the other hand, numerous authorities were presented by counsel for the defendants in support of their contention that the action having been dismissed for non-compliance with the provisions of the order of May 14th, was at an end, and there was no jurisdiction to make an order subsequently restoring it to the list, and in support of such contention the following authorities were cited: *Script Phonography Co. Limited* v. *Gregg*, 59 L.J. Ch. 406; *Whistler* v. *Hancock*, L.R. 3 Q.B.D. 83; *King* v. *Davenport*, L.R. 4 Q.B.D. 402; *Farden et al.* v. *Richter*, L.R. 23 Q.B.D. 124.

I am, therefore, of opinion, after reviewing the above authorities, that the plaintiff's action became dead on the 16th day of July by reason of his default, and that I have no power or authority to now restore it to the trial list.

The application will, therefore, be dismissed with costs.

Application dismissed.

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Feb. 21.

NATIONAL TRUST COMPANY, Limited (defendants, appellants) v. LOUIS E. WHICHER (plaintiff, respondent).

Judicial Committee of the Privy Council, Earl Loreburn, L.C., Lord Macnaghten, Lord Atkinson and Lord Robson. February 21, 1912.

1. TRUSTS (§ II B—48)—LIABILITIES OF TRUSTEES—MORTGAGE TO SECURE BONDS—REDEMPTION FUND—DISCRETION.

Where a mortgage to secure bonds provides that a fund for the redemption of the bonds shall be constituted, and that from the bonds from time to time offered for redemption, the trustee shall purchase those bonds which are offered at the lowest price, the trustee is not guilty of a breach of trust in purchasing a quantity of the bonds offered *en bloc*, merely because other bonds in small lots are offered at a lower price, if the acceptance of all the lower priced offers taken collectively would leave a large number of bonds to be redeemed at a higher rate which would make the average cost higher than the price of the single block of bonds purchased by the trustee for the money available for redemption purposes and which could not have been obtained otherwise than *en bloc*, at the price; the duty of the trustee in such case is to select such offer to sell bonds as will enable him to redeem the largest number of bonds with the money at his disposal.

[*Whicher* v. *National Trust Co.*, 19 O.L.R. 605, 14 O.W.R. 888, restored; *Whicher* v. *National Trust Co.*, 22 O.L.R. 460, 17 O.W.R. 788, 2 O.W.N. 383, reversed on appeal.]

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APPEAL by special leave from a judgment of the Court of Appeal for Ontario, 22 O.L.R. 460, reversing by a majority a judgment of Riddell, J., 19 O.L.R. 605.

Statement

The appellants were trustees under a mortgage deed executed on June 1, 1905, by the Dominion Copper Company, Limited, for its bondholders, including the respondent, who sued to recover $8,200, being the price at which he had offered to the appellants bonds of the par value of $10,000, founding his claim on their breach of trust or breach of contract.

The appellants on May 2, 1907, received from the Dominion Copper Company $170,000, to be applied in the redemption of bonds as provided by art. 2 of the mortgage deed set out in their Lordships' judgment. The question raised was whether under the circumstances, which were not in dispute, the appellants were entitled to reject the respondent's offer and instead of accepting it to redeem bonds which were offered to them by other bondholders at a higher price. It appeared that copper fell heavily in price and the company went into liquidation.

Riddell, J., found that the appellants had acted honestly and reasonably and were protected from liability by the Trustee Act, 62 Vict. ch. 15, sec. 1 (Ontario). He also considered that the deed should be construed in reference to the object in view, which was that the appellants should "redeem as many bonds as possible at the cheapest rate" and reduce as much as possible the bonded indebtedness of the company.

Moss, C.J.O., in appeal thought that the appellants were trustees for individual tenderers of bonds, and that although they acted in good faith they had not complied with the plain directions of the deed and were not protected by the Trustee Act, sec. 1. Garrow and Meredith, JJ.A., dissented and held that the trust was for the whole body of bondholders and not for the individual tenderer. There were offers above and below the plaintiff's, so that his offer was not at the lowest price. "The lowest price must have meant such offers as would redeem the most bonds for the sum available."

The appeal was allowed and the judgment of Riddell, J., restored.

Mr. Justice Riddell's judgment was as follows:—

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RIDDELL, J.:—No charge of collusion, fraud, or other wilful impropriety is made against the defendants, nor could any such be made; but it is contended that they have misinterpreted their deed of trust, and are liable as for a breach of their trust.

The document, dated the 1st June, 1905, is made between the Dominion Copper Co. Limited, as mortgagors, and the defendants, as trustees; it recites a resolution to borrow $1,000,000, and for that purpose to issue first mortgage 6 per cent.

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gold bonds, payable on the 1st June, 1915, bearing interest at six per cent., payable semi-annually, and sets out the form of bond—a delivery bond, but which might be registered. (In fact only four bonds of $100 each were ever registered.) The deed goes on:—

> Now therefore this indenture witnesseth that the Dominion Copper Company Limited, in consideration of the premises and of one dollar to it in hand paid by the trustee at the time of the execution and delivery of these presents, the receipt whereof is hereby acknowledged, and in order to secure the payment of the principal and interest of the bonds aforesaid to be issued as herein provided, and every part of said principal and interest as the same shall become payable according to the tenor of said bonds and the coupons thereto attached, and in order to insure the faithful performance of the covenants and agreements hereinafter set forth, and in order to declare the terms and conditions upon which said bonds are issued, received, and to be held, has executed and delivered these presents and has granted, bargained, sold, transferred, assigned, conveyed, and set over, and by these presents does grant, bargain, sell, transfer, assign, convey, and set over, unto the National Trust Company, as trustee, its successors and assigns forever, all its present and after-acquired real and personal property, assets, and effects, including among others: (setting out the property).

Then the trust is declared:—

> But in trust, nevertheless, for the equal *pro rata* use, benefit, and security of all and every the persons, firms, or corporations which shall become or be the owners or lawful holders of any of the said bonds issued or to be issued under and secured by this indenture, and of all coupons pertaining thereto, without preference, priority, or distinction as to lien or otherwise of any one bond over any other bond by reason of priority in the issue, sale, or negotiation thereof, or otherwise, so that each and every bond issued as aforesaid shall have the same right, lien, and privilege under and by virtue of this indenture, and so that the principal and interest of every such bond shall, subject to the terms hereof, be equally and proportionately secured hereby, as if all had been duly issued, sold, and negotiated simultaneously with the execution and delivery of this indenture.

Then comes a very voluminous enumeration of the terms on which the bonds are issued, that upon which the plaintiff relies being art. 2, sec. 12:—

> Section 12. The mortgagor company will on the first day of June, 1906, and the first day of June, 1907, pay to the trustee all of its surplus profits for such years after all payments and reservations for betterments, improvements, and extensions have been deducted, up to but not exceeding ten per cent. of the aggregate amount of bonds outstanding on the first day of April immediately preceding the first day of June on which the particular payment is to be made. In case, however, the surplus profits of the mortgagor company on the first day of June, 1906, shall not be equal to ten per cent. of the

aggregate amount of bonds outstanding on the first day of April, 1906, but the surplus profits of the mortgagor company on the first day of June, 1907, shall exceed ten per cent. of the aggregate amount of bonds outstanding on the first day of April, 1907, then and in that event the mortgagor company will pay to the trustee on said first day of June, 1907, an amount equal not only to ten per cent. of the aggregate amount of bonds outstanding on the first day of April, 1907, but also such an amount as shall be equal to the difference between the amount of the payment made by it to the trustee on the first day of June, 1906, and an amount equal to ten per cent. of the aggregate amount of bonds outstanding on the first day of April, 1906.

The trustee shall be under no duties or responsibilities as to the payment over of such surplus profits by the mortgagor company, and the trustee may rely entirely upon the certificate or certificates of any officer of the mortgagor company as to such surplus profits.

The mortgagor company will, on the first day of June, 1908, and on the first day of June in every succeeding year up to and including the first day of June, 1914, pay to the trustee an amount equal to ten per cent. of the aggregate amount of bonds outstanding on the first day of April immediately preceding the first day of June on which the particular payment is to be made. Nothing herein contained, however, shall be construed to prevent the mortgagor company from paying nor the trustee from receiving the payment herein provided for before the first day of June in any year.

The moneys so paid to the trustee shall be applied to the retirement of bonds of the company issued hereunder and secured hereby and for that purpose only, to be obtained as follows:—

(1) During the period extending from the first day of June, 1906, to the first day of June, 1914, both inclusive, the trustee shall annually, or oftener, at such times as it shall deem advisable in the exercise of an absolute discretion, by a notice published once a week for two consecutive weeks in a newspaper in general circulation in the city of New York, and in a newspaper in general circulation in the city of Toronto, call for offerings of the bonds issued under and secured hereby, to be made within some period prescribed in said notice, and from the bonds offered to it shall purchase those bonds which are offered to it at the lowest price, not, however, exceeding the par value of said bonds and the then accrued interest for each such bond.

As the sub-sec. 2, which immediately follows, may require to be considered, I add it here together with the conclusion of sec. 12:—

(2) If, during the prescribed period, sufficient bonds are not offered to exhaust said fund at less than par, then and in that event said trustee shall, by a notice published once a week for two successive weeks in a newspaper of general circulation published in the city of New York, and in a newspaper of general circulation in the city of Toronto, give notice that certain bonds, specifying the same by their numbers to be drawn by lot as below mentioned, are called for the purpose of investing therein the moneys paid to the trustee by the mortgagor company. If any outstanding bonds are registered, then a copy of such notice shall also be sent to the post office address of the

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holder or holders in whose name or names such bonds are registered. Such bonds so to be called shall be chosen by lot by the trustee. The bonds having been so called shall become due and payable at the office of the trustee upon a date specified in the call, which date shall not be less than thirty days after the publication of said notice, at par of said bonds, and the interest then accrued thereon for each such bond.

The bonds of the company which shall be acquired under the above provisions shall, as soon as received by the trustee, be cancelled.

The defendants had acted as agents for the mining company in the sale of stock, bonds, etc., and had in May, 1907, a large sum of money belonging to the company in their hands: the mining company had surplus earnings to a net amount of over $180,000 available to hand over for the redemption of bonds: and it was arranged that, to save costs, etc., of transmitting money to and from the companies, the defendants should use, of the moneys in their hands belonging to the mining company, sufficient, with a small remittance from the mining company, to make up a sum of $170,000 to apply in redemption of bonds.

An advertisement was on the 2nd May, 1907, made by the defendants in the following form:—

> The Dominion Copper Company Limited. (No personal liability). First mortgage six per cent. gold bonds.
>
> The Dominion Copper Company Limited, in accordance with the requirements of its mortgage, dated June 1st, 1905, securing the above issue, has paid out of its earnings the sum of one hundred and seventy thousand dollars ($170,000) to the National Trust Company Limited trustees under the mortgage, to be applied in the redemption of bonds, as provided by the mortgage. Offerings of the bonds for sale as of June 1st, 1907, exclusive of the interest coupon maturing on that date, stating the amount offered and price for delivery at the office of the undersigned, at Toronto, Ontario, will be received by the undersigned up to and inclusive of May 25th, 1907.
>
> National Trust Company Limited.
> 18-22 King St. East,
> Toronto, Canada.

A circular in similar terms was sent to all the bondholders who were known to the defendants.

On the 10th May, 1907, the plaintiff wrote to the defendants from New York:—

> Your circular letter, in reference to the Dominion Copper Company Limited first mortgage six per cent. gold bonds, duly received. I hereby offer you ten thousand of these bonds at eighty-two (82). L. E. Whicher.

Many tenders or offerings were received from others, some below and some above the figure of the plaintiff. The total amount of the offerings below par was $363,300, at prices aggregating $309,785.70. Of these, however, one tender by Unter

meyer was $190,700 at $170,000, *i.e.*, at a rate of about 87. Exclusive of these bonds it will be seen that there were $167,600 offered at $139,785.70. If all the offered bonds (excluding Untermeyer's) were taken up, the result would be that $170,000—$139,785.70=$30,214.30—would remain unused in the hands of the defendants. Mr. White, the manager of the defendants, thought it the duty of the defendants to expend all, or as nearly as possible all, of the $170,000 in redeeming bonds, and accordingly telegraphed Untermeyer asking if he would accept the figure named for part of his bonds; Untermeyer answered that he was anxious to do the best possible for the company, and would entertain proposal for selling balance if the defendants had offers for small amounts on better terms. The defendants answered (27th May) that they had tenders for $142,000 bonds for $115,742.70, and asked if Untermeyer would sell $62,400 bonds for balance of sinking fund. Untermeyer suggested that the defendants should take $50,000 to $60,000 lowest tenders, and he would furnish sufficient at the figure named to redeem $200,000 for $170,000. This was not satisfactory to the defendants. Mr. White was then under the impression that the amount of bonds could be made up by drawing at par under the provisions of 12 (2); and he concluded that it would be better financially to buy all but Untermeyer's at the rate at which they were offered by the various offerers and pay for the remainder at par, than to accept Untermeyer's proposal. He accordingly telegraphed Untermeyer that unless he were willing to sell $62,400 bonds at the rate mentioned in his letter, the defendants must reject Untermeyer's tender. White, however, after careful study of the terms of sec. 12 (2), came to the conclusion that the defendants had no such power of drawing, and accordingly telegraphed Untermeyer that the defendants thought they ought to accept his original tender. Being anxious to redeem all that were offered under 80, *viz.*, $39,400, the defendants telegraphed asking if Untermeyer was willing for the defendants to accept $39,400 from other tenderers at about 79, and to purchase the remainder from Untermeyer to exhaust the sinking fund. This was acceded to. The plaintiff's tender was declined by letter of the 28th May; Untermeyer furnished $160,600 bonds for $139,062.25. The bonds redeemed were $200,000, and the fund was exhausted.

A slump took place in copper, and the mining company lost heavily and is now in liquidation.

The plaintiff's claim in contract is put forward thus: The defendants are trustees under all the terms of the trust deed: one of these is that they "from the bonds offered . . . shall purchase those bonds which are offered . . . at the lowest price;" the advertisement and circular referred to the trust

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deed, and consequently the advertisement and circular should be taken as though the defendants were expressly promising to buy in accordance with the terms of the trust deed, *i.e.*, the bonds which were offered at the lowest price; that this constituted an offer by the defendants to buy upon the tender at the lowest price; that the plaintiff did so tender, and consequently the defendants are bound..

Such cases as *Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q.B. 256; *Johnston* v. *Boyes*, [1899] 2 Ch. 73, *Maskelyne* v. *Stollery* (1899), 16 Times L.R. 97; *Warlow* v. *Harrison* (1858), 1 E. & E. 295, 317, are cited in support.

No doubt, if this advertisement were to be read as saying, "We ask offerings of bonds and will buy the bonds which are offered at the lowest price," then, if the offerings of the plaintiff were at the lowest price, the very offering might be considered an acceptance by the plaintiff of a contract offered to him by the defendants; see *per* Lindley, L.J., in *Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q.B., at pp. 262, 263. But there is no such statement made in the advertisement. It is sought to import into the advertisement the terms of the trust deed. Although *Rooke* v. *Dawson*, [1895] 1 Ch. 480, is not conclusive against this view, as there the deed was not mentioned in the advertisement (see p. 486), I do not think that the deed is by implication made part of the advertisement.

But, if it were, the direction to purchase at the lowest price cannot mean precisely what the literal meaning of the words is. In the present instance there is an offer of $1,000 at 75; one of 1,000 at 76; one of 1,000 at 77; one of 7,900 at 77, etc. The bonds offered at the lowest price are those included in the offer at 75 only—it could not be contended that the purchase of the 1,000 at 75 would be a complete exercise of the powers given by the trust. The expression must in a business document receive a business interpretation—the meaning can be determined from a consideration of the object for which the power is given. The object is to redeem as many bonds as possible at the cheapest rate—to spend the money furnished by the company in reducing as much as possible the bonded indebtedness of the company. I am of the opinion that the method ultimately pursued by the defendants was unexceptionable from a business point of view, and was in no way a violation of the terms of the deed of trust.

I think the plaintiff fails in contract. If he be held entitled to recover in contract at all, I find that the market price of the bonds at the time of the breach was 75—his damages will then be $700.

The same consideration will also prevent him from recovering as *cestui que trust*.

The defendants have, in the premises, acted honestly and reasonably, and ought fairly to be excused for the breach of trust, if there was one: 62 Vict. (2), ch. 15, sec. 1 (O.); *Stewart* v. *Snyder* (1900), 27 A.R. 423; *Smith* v. *Mason* (1901), 1 O.L.R. 594; *Henning* v. *Maclean* (1901-2), 2 O.L.R. 169, 4 O.L.R. 666; *Re Village of Markham and Town of Aurora* (1902), 3 O.L.R. 609; *Dover* v. *Denne* (1902), 3 O.L.R. 664; *King* v. *Matthews* (1903), 5 O.L.R. 228; *Elgin Loan and Savings Co.* v. *National Trust Co.* (1903-5), 7 O.L.R. 1, 10 O.L.R. 41; *Chapman* v. *Browne*, [1902] 1 Ch. 785, especially at p. 805.

I am also of the opinion, as at present advised, that the other provisions in the trust deed protect the defendants, but I do not consider it necessary to pass upon that question.

The action will be dismissed with costs.

Statement

The present appeal was taken from the order of the Court of Appeal for Ontario, reversing the above judgment, the opinion of the Court of Appeal being reported *sub nom. Whicher* v. *National Trust Co.*, 22 O.L.R. 460.

Argument

Sir R. Finlay, K.C., *Anglin*, K.C., *W. Finlay*, and *Cassels*, for the appellants, contended that there was no breach of the directions contained in the mortgage deed. The appellants were trustees for the whole body of bondholders collectively. They were not trustees for any individual tenderer. They acted reasonably and in good faith and were protected from liability both by the Trustee Act, sec. 1, and by the provisions of the trust deed. See *National Trustees Co. of Australia* v. *General Finance Co.*, [1905] A.C. 373. There was no liability either in contract or quasi-contract. Reference was made to *Spencer* v. *Harding* (1870), L.R. 5 C.P. 561, and as to contract by advertisement to *Rooke* v. *Dawson*, [1895] 1 Ch. 480; *Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q.B. 256.

Messrs. *Younger*, K.C., and *G. Lawrence*, for the respondent, contended that art. 2 of the mortgage deed was a provision for the benefit of the bondholders as well as the company. It created a trust for individual bondholders who tendered their bonds for redemption. The trustees had no option but to redeem those bonds which were tendered to them at the lowest price, and it was breach of trust to refuse the respondent's tender in favour of those who tendered at a higher price. The advertisement and circular sent out by the appellants to the respondent as well as other bondholders, constituted their offer to take the respondent's bonds when tendered on the terms of the mortgage deed, and the respondent's tender was an acceptance of that offer. See *South Hetton Coal Co.* v. *Haswell, etc., Coke and Coal Co.*, [1898] 1 Ch. 465. The case of *Rooke* v. *Dawson*, [1895] 1 Ch. 480, did not apply to this case. There was, therefore, breach of contract in refusing it as well as breach of

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trust. Neither the trust deed nor the Trustee Act protected the appellants, who acted in breach of their duty in accepting offers higher than that made by the respondent.

Counsel for the appellants were not heard in reply.

At the close of the arguments their Lordships said they would report to His Majesty that the appeal should be allowed, and subsequently, February 21, 1912, the reasons for that report were delivered by

Lord Robson.

LORD ROBSON:—This action was brought by the respondent as a bondholder in the Dominion Copper Company, a corporation constituted under the laws of British Columbia, against the appellants, who are a trust company and were trustees for the bondholders of the Copper Company under a mortgage deed of June 1, 1905. The respondent claimed that the appellants had committed a breach of trust, and further, or alternatively, had committed a breach of contract in refusing to purchase from him certain of his bonds in the Copper Company which he had offered to them for sale in response to an advertisement inviting tenders of bonds under the terms of the mortgage deed.

Shortly stated, the respondent contends that the appellants were bound to expend a certain fund in purchasing bonds at the lowest price, and that his bonds were offered at a price lower than that accepted from the successful tenderer. The appellants, on the other hand, contend that the respondent's offer was for a comparatively small quantity of bonds, and, if accepted, would have put it out of the power of the appellants to purchase the much larger quantity offered by the successful tenderer at a price which admittedly enabled the trustees to expend the whole fund at their disposal so as to procure a larger number of bonds at a lower average price than they could have done if they had accepted the offer of the respondent.

It is admitted that the appellants acted in perfect good faith and in the exercise of an honest judgment as to what appeared to them to be within their powers and in the interest of the bondholders as a whole.

The mortgage deed provided that a fund for the purchase or retirement of bonds should be constituted by means of a stipulated appropriation year by year from the surplus profits of the Copper Company.

By art. 2, sec. 12, it is directed that "The moneys so paid to the trustee shall be applied to the retirement of bonds of the company issued hereunder and secured hereby, and for that purpose only, to be obtained as follows" (omitting immaterial parts):—"The trustee shall . . . annually or oftener . . . by a notice published . . . in a newspaper in general circulation in the cities of New York and Toronto, call for offerings of the bonds issued under and secured hereby, to be made

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within some period prescribed in the said notice, and from the bonds offered to it shall purchase those bonds which are offered to it at the lowest price, not, however, exceeding par value of said bonds and the then accrued interest for each such bond."

The section goes on to prescribe that if sufficient bonds are not offered to exhaust the said fund at less than par, then and in that event "The trustee shall by a notice in manner therein directed, give notice that certain bonds to be drawn by lot are called for the purpose of investing therein the moneys paid to the trustee by the mortgagor company."

On May 2, 1907, the mortgagor company handed to the appellants the sum of $170,000 to be applied in the redemption of bonds according to the terms of the mortgage, and the appellants thereupon published the following advertisement:—

"The Dominion Copper Company, Limited.

"First Mortgage 6 per cent. Gold Bonds.

"The Dominion Copper Company, Limited, in accordance with the requirements of its mortgage, dated the 1st June, 1905, securing the above issue, has paid out of its earnings the sum of one hundred and seventy thousand dollars ($170,000) to the National Trust Company, Limited, trustee under the mortgage to be applied in the redemption of bonds as provided by the mortgage. Offerings of the bonds for sale as of 1st June, 1907, exclusive of interest coupon maturing on that date, stating the amount offered and price for delivery at the office of the undersigned, at Toronto, Ontario, will be received by the undersigned up to and inclusive of 25th May, 1907.

"National Trust Company, Limited."

The respondent answered the said advertisement and duly offered $10,000 bonds at $82 per bond of $100.

The following is a convenient summary of all the tenders at prices below par:—

Rate.	Par value.	Offered at.
Under 80	$ 39,400.00	$ 30,937.75
80-86 inclusive	102,600.00	84,804.95
86.8 (Untermeyer)	195,700.00	170,000.00
Over 86.8	25,600.00	24,043.00
	$363,300.00	$309,785.70

It will be observed that Mr. Untermeyer offered bonds to the nominal value of $195,700 at the price of 86.8, which was just enough to exhaust the fund. The appellants naturally treated this as an indivisible offer, and, wishing to buy all the bonds (including the plaintiff's) which were offered at lower prices, they asked Mr. Untermeyer whether, if they did so, he would be willing to offer sufficient bonds at 86.8 to exhaust the balance of the fund.

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After correspondence and interviews, with which it is not necessary to deal in detail, it was ultimately agreed that the appellants might buy bonds amounting to $39,400 at rates less than 80, if he, Mr. Untermeyer, would offer bonds of the nominal value of $160,600 for the balance of the sinking fund. By this means the appellants succeeded in obtaining bonds amounting to $200,000 for the money at their disposal, whereas if they had accepted all the offers (including the plaintiff's) below 86, and Untermeyer had withdrawn his offer, as he would have done if the terms ultimately arranged had not been agreed to, they would only have got bonds below par amounting to $142,000, and would have been obliged to expend the balance of the fund in purchases at par.

The plaintiff's offer was therefore declined. A great fall in the price of copper afterwards took place, by which the Copper Company lost heavily, and it is now in liquidation.

At the trial Riddell, J., decided in favour of the appellants, and further held that, even if they were wrong in refusing the plaintiff's offer, they had acted honestly and carefully, so that they were entitled to be excused both under the Provincial Trustee Act and the provisions in that behalf of the trust deed itself. This decision was reversed by a majority of three Judges to two in the Court of Appeal for Ontario, and judgment was entered for the plaintiff for $700, with costs.

Their Lordships are of opinion that the appellants properly fulfilled the obligation cast upon them by art. 2, sec. 12, of the trust deed. There can be no doubt as to the object of that section. It was intended by all the parties to the deed that the appellants should obtain as many bonds as possible with the money placed at their disposal, and they were accordingly directed to select, from the bonds tendered, those which were cheapest.

As Riddell, J., pointed out, on a strictly literal construction of the words of the clause, the obligation of the appellants to purchase "those bonds which are offered to it at the lowest price" does not expressly extend beyond the particular lot which is offered at a price lower than any other lot to buy, leaving the trustees without any directions as to how they were to select from the other bonds, but no one has suggested such a construction except for the purpose of dismissing it as wholly unreasonable when tested by the object of the clause. The Court must, if possible, construe the clause so as to give effect to the plain intent of the parties. In buying bonds the appellants had to consider number as well as price. Indeed a low price was only important because it facilitated the acquisition of a large number. Under these circumstances "the lowest price" meant the price which was lowest as applied to the whole block purchased. If the appellants had purchased the small lot of bonds offered by the plaintiffs at 82, and had been unable, in consequence of

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that purchase, to complete the bargain with Untermeyer, the price given for the whole block of bonds purchased would certainly not have been the lowest price at which an equal number of bonds could have been purchased under the agreement with Untermeyer, and by the acceptance of his offer.

In this view of the case, it is unnecessary to consider the points raised as to contract or trust, or the further question which would arise if an obligation on either of these grounds could be shewn to exist between these parties, namely, how far a trustee or agent can be made liable for an honest and reasonable misinterpretation of ambiguously worded instructions; for in neither alternative did the appellants commit any breach.

Their Lordships have therefore humbly advised His Majesty that this appeal should be allowed, the judgment of the Court of Appeal set aside, and the judgment of Riddell, J., restored, with costs in both Courts.

The respondent will pay the costs of the appeal.

Appeal allowed.

TORONTO AND NIAGARA POWER COMPANY v. TOWN OF NORTH TORONTO.

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Judicial Committee of the Privy Council, Viscount Haldane, L.C., Lord Macnaghten, Lord Dunedin, Lord Atkinson, and Sir Charles Fitzpatrick. July 24, 1912.

1. STATUTES (§ 3 II A—98)—CONSTRUCTION—GIVING EFFECT TO WHOLE STATUTE—SPECULATION AS TO LEGISLATIVE INTENT.

In deciding a question of statutory construction, a Court of justice is not entitled to speculate as to which of two conflicting policies was intended to prevail, but must confine itself to the construction of the language of the relevant statutes taken as a whole.

2. STATUTES (§ II A—96)—LEGISLATIVE INTENT—RAILWAY ACT, R.S.C. 1906, CH. 37.

The language of the Railway Act, R.S.C. 1906, ch. 37, expresses an intention to preserve intact all powers conferred by previous special Acts of incorporation upon companies within its scope, except where otherwise specifically mentioned.

3. STATUTES (§ II A—96)—INTENTION OF PARLIAMENT—RAILWAY ACT, R.S.C. 1906, CH. 37, SEC. 248.

Section 248 of the Railway Act, R.S.C. 1906, ch. 37, shews that, where Parliament intended by that Act to interfere with the powers of companies other than railway companies, it has done so by special provision.

4. HIGHWAYS (§ II B—47)—SPECIAL ACT CONFERRING POWERS ON ELECTRIC LIGHT COMPANY—USER OF HIGHWAY—ERECTION OF POLES IN STREET.

The powers conferred upon the Toronto and Niagara Power Company by sections 12 and 13 of its Act of incorporation of 1902, remain intact notwithstanding the provisions of the Railway Act, R.S.C. 1906, ch. 37, and that company is entitled to erect poles for the purpose of stringing power of transmission lines along the streets of a municipality, without the consent of the municipality.

[*Toronto and Niagara Power Co.* v. *Town of North Toronto*, 2 D.L.R. 120, reversed on appeal.]

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TORONTO & NIAGARA POWER CO. v. TOWN OF NORTH TORONTO.

The Lord Chancellor.

APPEAL from a judgment of the Court of Appeal for Ontario of February 1, 1912, 2 D.L.R. 120, reversing a decision of Chancellor Boyd.

The appeal was allowed.

Wallace Nesbitt, K.C. (of the Canadian Bar), *Atkin*, K.C., and *D. L. McCarthy*, K.C. (of the Canadian Bar), for the appellants.

Sir Robert Finlay, K.C., and *T. A. Gibson* (of the Canadian Bar) for the respondents.

The LORD CHANCELLOR (VISCOUNT HALDANE) in delivering their Lordships' judgment to-day, said the question raised by the appeal was whether the appellant company might enter upon the streets of the town of North Toronto for the purpose of erecting poles to carry power lines for the conveyance of electricity. Chancellor Boyd decided that they had such power, but subject to compliance with certain conditions. The Court of Appeal reversed his judgment, holding that the appellants had no such power unless they had first obtained the leave and license of the respondent corporation.

By their Act of incorporation in 1902 the appellants were given, unless the powers which it *primâ facie* conferred were restricted by the Railway Act, very large powers which entitled them to succeed in the present action. If it could be taken by itself their Lordships were of opinion that the Act shewed that the Parliament of Canada treated the company, the works of which were expressly declared to be for the general advantage of Canada, and so brought within section 91 of the British North America Act, as proper to be entrusted with freedom to interfere with municipal and private rights. For that there might well have been, on the balance of advantages, good reason, the purpose of the company being to bring electric power from Niagara Falls to parts of Canada, to reach which its lines would have to pass through a series of municipal areas.

To make its powers of entry subject to the veto of each municipality might mean failure to achieve its purpose. It was therefore not surprising that a pioneer company such as that should have been given large powers.

But while *primâ facie* such powers were given, their Lordships collected from other legislation of the period that the Legislature was fully aware of the difficulties of giving such powers without restriction, and that the question of safeguards was present to the minds of the draughtsmen. Companies which had power to bring electrical power and wires into Canadian cities might prove a serious danger to the public. The evidence in the present case shewed the peril to the safety and the lives and property of the inhabitants of a populous district which a high voltage, such as that of a power company, might occasion.

The Parliament of Canada, not unnaturally anxious to avoid dangers of that kind, accordingly passed general statutes conferring upon municipal authorities large powers of control. Section 90 of the Railway Act, 1888, was amended by the Railway Act, 1899 [62 & 63 Viet. (Can.) ch. 37], which added to it a sub-section illustrative of that kind of control.

The new sub-section enacted that when any company had power by any Act of the Parliament of Canada to construct and maintain lines of telegraph or telephone, or for the conveyance of light, heat, power, or electricity, such company might, with the consent of the municipal council or other authority having jurisdiction over any highway, square, or other public place, enter thereon for the purpose of exercising such power, and break up and open any highway, square, or other public place.

If the powers conferred by that section displaced the less restricted powers of entering without any consent conferred by the Act of incorporation, the appellants were in the wrong. Their Lordships had therefore to determine this question. They had to bear in mind that a Court of Justice was not entitled to speculate as to which of two conflicting policies was intended to prevail, but must confine itself to the construction of the language of the relevant statutes read as a whole. His Lordship referred to the General Railway Act of 1906, which repealed and re-enacted, with some modifications, the previous railway Acts, in order to see what light its language threw on the question whether the powers originally conferred in 1902 by the Act of incorporation still stood unrestricted. He said the draughtsmen used language which expressed an intention to save all such powers.

By the definition of section (2) "company" meant a railway company, and "Special Act" meant any Act under which the company had authority to construct or operate a railway, or which was enacted with special reference to such railway. By section 3 the General Act was to be construed as incorporated with the Special Act, and, unless otherwise provided in the General Act, where the provisions of the General Act and of any Special Act passed by the Parliament of Canada related to the same subject-matter the provisions of the Special Act should, in so far as was necessary to give effect to such Special Act, be taken to override the provisions of the General Act.

By section 4 if in any Special Act passed by the Parliament of Canada previously to February 1, 1904, it was enacted that any provision of the Railway Act, 1888, or other general railway Act in force at the time of the passing of such Special Act, was excepted from incorporation therewith, or if the application of any such provision was by such Special Act, extended, limited, or qualified, the corresponding provision of the General

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Act was to be taken to be excepted, extended, limited, or qualified, in like manner.

By section 247 when any company was empowered by Special Act of the Parliament of Canada to construct, operate, and maintain lines of telegraph or telephone or for the conveyance of light, heat, power or electricity, the company might, with the consent of the municipal council or other authority having jurisdiction over any highway, square, or other public place, enter thereon for the purpose of exercising its powers, and subject to certain restrictions, break up the ground. If the company could not obtain leave from the municipality it might apply to the Board of Railway Commissioners, and the Board had discretion to grant such leave. Section 248 specially defined the word "company," for the purposes of that particular section to include a telephone company, and imposed restrictions on the powers of such companies to construct, maintain, or operate their lines of telephone upon, along, across, or under any highway, square, or other public place in any city, town, or village, without the consent of the municipality.

The materiality of that section, which was to apply notwithstanding any provision of any Act of the Parliament of Canada, was that it shewed that where the Legislature intended to interfere with the powers of companies other than railway companies, it did so by special provision.

Section 247, in the opinion of their Lordships, applied so far as the wording of the section itself was concerned, only to companies within the definition clause, that was to railway companies. Railway companies might have power to construct lines of telegraph or telephone, or for the conveyance of light, heat, power, or electricity. When they had such powers, and no special power to enter on municipal property, the section empowered them to do so, if the municipality consented and under restrictions. But if by its Special Act the railway company had been in terms given larger and less restricted powers of the same kind, sections 3 and 4 already referred to shewed that these special powers were saved. An exception to that appeared in sub-section (*g*) of section 247 where the Board of Railway Commissioners was given jurisdiction to abrogate rights given by the Special Act to the extent of requiring the lines to be placed underground.

As to that sub-section, two observations must be made. The first was that no question of its application was raised in this litigation. The second was that the application of the sub-section was excluded by the wording of section 21 of the Act of incorporation. It was inconsistent with the provisions of that Act, for it was in reality only one of the provisions of the Railway Act of 1906 relating to railway companies, and was therefore excluded.

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The only way in which section 247 of the Railway Act of 1906 was applicable to the appellants was by the language in which it was made applicable by section 21 of their special Act. But if the provisions of section 90 of the Railway Act, 1888, as amended by the Railway Act, 1899, and in substance re-enacted with additions by the Railway Acts, 1903 and 1906, were, as appeared to be the case, kept alive by the Interpretation Act, those provisions were declared by section 21 of the special Act applicable only in so far as they were not inconsistent with the provisions of that Act. Moreover, the definitions of "company" and "railway" in section 21 made sections 3 and 4 of the Railway Act, 1906, apply so that the provisions of the appellants' Act of incorporation overrode and extended the provisions of section 247. In the result it appeared to their Lordships that the powers conferred by sections 12 and 13 of the Act of incorporation of 1902 remained intact.

In the Court below the trial Judge decided in favour of the appellants on the question of power to enter and erect their poles without consent. The Court of Appeal took a different view. They held that the general restrictions imposed by section 90 of the Act of 1888, as amended by the Act of 1899, and by section 247 of the Act of 1906, were not inconsistent with the provisions of sections 12 and 13 of the Act of incorporation. For those reasons their Lordships could not agree with that opinion. They would therefore humbly advise his Majesty that the appeal should be allowed, and that it should be declared that the appellants were entitled to a declaration that they were at liberty to erect poles for the purpose of stringing transmission or power wires along Eglinton avenue without the consent of the respondents, and to have the latter restrained from interfering with them in doing so. The respondents must pay the costs of this appeal and in the Courts below.

Appeal allowed.

THE UNION BREWERY, Limited v. PAGE.

QUE.

C. R.
1912

Jan. 27.

Quebec Court of Review, Guerin, Mathieu and Bruneau, JJ.
January 27, 1912.

1. SALE (§ I D—21)—REASONABLENESS OF TEN MONTHS IN WHICH TO DISPOSE OF BEER—SALE "A MESURE QU'ELLE SE DISPENSERA"—ABSENCE OF GUARANTEE FOR MORE THAN ONE YEAR.

Under a sale of a quantity of beer and ale "*à mesure qu'elle se dispensera*," ten months' time is a reasonable period in which to dispose of it, after which the seller may recover its value, where it is shewn that brewers do not guarantee the soundness of beer for more than one year.

2. SALE (§ I D—21)—LIABILITY OF BUYER OF BEER FOR CONTAINERS NOT RETURNED.

In an action for the price of beer and ale sold the defendant, he is liable for the value of empty barrels not returned to the seller.

[*Parker* v. *Fulton*, 21 L.C.J. 255, specially referred to.]

QUE.

C. R.
1912

UNION BREWERY, LIMITED v. PAGE.

Guerin, J.

APPEAL from a judgment rendered by the Superior Court, Lynch, J., on September 10, 1910.

The appeal was dismissed.

Messrs. *Kavanagh, Lajoie* and *Lacoste*, for the plaintiff.

Messrs. *McKeown* and *Boivin*, for the defendant.

GUERIN, J.:—The defendant inscribes in review against a judgment of the 28th September, 1910, which condemned him to pay the plaintiff $242.05 for beer and ale sold to him, and to return its cases, casks and bottles within 15 days, failing which to pay a further sum of $398.75.

The plaintiff sued the defendant for $645, being $246.25 for beer and ale, as per its detailed statements, and $398.75 for empty cases, casks and bottles, as per its other detailed statement.

The defendant pleaded that the action was prematurely taken, that the sale of the beer and ale was made upon the express stipulation that the same would be payable only as the same was disposed of, that this agreement was in conformity with the custom prevailing, that the defendant used diligence to sell the liquids, and that the defendant has overpaid the plaintiff for all the beer and ale disposed of up to the date of the issue of the writ in this case. As regards the cases, casks and bottles, the defendant pleaded he never purchased these articles from the plaintiff, and that, by the custom of trade, he is entitled to retain possession of the same until their contents are sold, and that he has already returned thirteen barrels and three half-barrels, and has on hand twenty cases of empty bottles awaiting the plaintiff's demand.

The sale which the plaintiff alleges goes back over three years. The defendant was then a hotelkeeper in Granby, P.Q. He has since sold out this business. The plaintiff is a company carrying on the business of brewers, with a head office in Montreal. On the 21st September, 1908, the defendant gave the plaintiff a sample order; it represented $10.75; no term of payment was specified. On 23rd September, 1908, the defendant purchased $55 worth of the plaintiff's goods, the term of payment agreed upon was four months. On 22nd October, 1908, the defendant purchased $430.75 worth of the plaintiff's goods; it was a full carload. The term of payment agreed upon was as follows: "à mesure qu'elle se dispensera."

Three months afterwards, viz., on the 21st of January, 1909, the plaintiff wrote the defendant, enclosing him his account for $496.25, and asking him for a payment on account. Again on 15th of March, 1909, the company renewed its demand for a payment on account. On 14th April, 1909, the defendant paid a visit to the plaintiff's brewery in Montreal, gave his note for $250 at two months on account, although at that time he states

in his testimony that he had only disposed of $138 of the plaintiff's goods. At the same time the defendant did not complain of the quality of what he had received, but gave a further order for more goods.

The plaintiff, however, did not fill this new order. The defendant paid the $250 and the plaintiff continued to ask him to settle the balance. On the 16th of July, 1909, the plaintiff wrote him that nine months had expired since the sale and that he should pay the balance due. On the 29th of August, 1909, the plaintiff instituted action against the defendant.

As regards the interpretation to be put upon the clause, "à mesure qu'elle se dispensera," it is to be noted that the defendant has not proved that this agreement was in conformity with the custom of trade. The learned Judge who rendered the judgment *a quo* states that it is the duty of the Court to give a reasonable interpretation to this clause, so that effect may be given to the contract, and that to do so all the facts and circumstances must be taken into account. It is proved that the brewers themselves will not guarantee the soundness of this beer longer than one year; it would hardly be reasonable to interpret the clause as extending beyond such a limit. If it was to be interpreted literally the vendor would be at the complete mercy of the purchaser, who might, if he chose, hold back the sales, and thus postpone indefinitely his obligation to pay.

The defendant was given over ten months' time to dispose of the beer and ale for which he is sued, and the judgment appealed from holds that this was a reasonable delay, under the circumstances, within which to dispose of the same. I am of the same opinion. As regards the empties, the defendant might well have been condemned to pay for the empties which he did not tender back to the plaintiff. The judgment mercifully granted him a concession for which he did not ask, and allowed him to return within 15 days, should he prefer to do so, instead of paying the value thereof. The option given him is no prejudice to him: arts. 3 and 113 C.P. See also *Parker* v. *Fulton*, 21 L. C.J. 255, Dorion, C.J., speaking for the full bench, states:—

> It is a well-established rule that a Court cannot grant more than is asked by the parties, yet it can grant less or grant the demand in a modified form. Here the appellant was not entitled to a dismissal of the action pure and simple, but we think he was entitled to an order that the action be dismissed, unless the respondent should give him security within a certain delay, and this Court considers that the Superior Court, in accordance with the uniform practice before the code, should have ordered the respondent to give security within a reasonable delay, and that in default of such security being given within such delay, the action should be dismissed.

I see no error in the judgment appealed from, and I am of the opinion that the inscription in review should be dismissed with costs.

Appeal dismissed.

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S. C.
1912

June 22.

Re REID and The LEITCH COLLIERIES, Limited.

Alberta Supreme Court, Scott, Stuart and Simmons, JJ. June 22, 1912.

1. DEATH (§ IV—29)—DEFENCES—WORKMEN'S COMPENSATION ACT (ALTA.) —COMPROMISE AND SETTLEMENT—UNAUTHORIZED OFFER OF LIABILITY INSURANCE COMPANY TO SETTLE.

An award of $1,000 as damages for the death of a workman, cannot be based by an arbitrator under the Workmen's Compensation Act of Alberta, 1908, upon the facts that the manager of the company informed the claimant that her claim would be settled, and that the solicitors for the company wrote the solicitors for the claimant that they thought the matter should be settled, and that an assurance company, which was liable to indemnify the company in respect of such claim, sent a letter to the claimant making her an offer of one thousand dollars, in settlement of her claim, which did not appear to have been authorized by the company with whom the workman had been employed and against which the award was made.

2. MASTER AND SERVANT (§ I B—7)—WHEN RELATION EXISTS—CONTRACTOR —WORKMEN'S COMPENSATION ACT (ALTA.).

One who contracts to take coal from a mine, and over whom the mine owner has no control, is not a workman within the meaning of the Alberta Workmen's Compensation Act, 1908.

[*Vamplew* v. *Parkgate Iron and Steel Co.*, [1903] 1 K.B. 851, and Ruegg's Employers' Liability, 7th ed., 224, referred to.]

Statement

APPEAL by the Leitch Collieries Limited from the award of His Honour Judge J. L. Crawford, District Judge, in favour of the widow, Elizabeth C. Reid, upon an arbitration held under the provisions of the Workmen's Compensation Act (Alta.), 1908, in respect of the death of her husband, William N. Reid, who was killed in the mine of the Leitch Collieries Limited, where he was employed under the contract set out in the following opinion of SCOTT, J.

The appeal was allowed.

J. W. McDonald, for the Leitch Collieries Limited, appellants.

P. J. Nolan, for respondent, Elizabeth C. Reid.

Scott, J.

SCOTT, J.:—William N. Reid, the husband of Elizabeth C. Reid, was killed by an accident in the company's mine on the 17th November, 1910. Formal notice of the death of the deceased and of the claim of the widow for compensation was not given to the company until the 5th September, 1911; but it appears that the company's general manager, Hamilton, had notice of the accident and the death of the deceased therefrom immediately after it occurred.

At the time of the accident which resulted in his death the deceased was working in the company's mine under the following agreement in writing:—

> Articles of agreement entered into this 10th day of October, A.D. 1910, between William Nesbit Reid, contractor, of Passburg, Alberta, hereafter known as the party of the first part, and the Leitch Collieries Limited, of Passburg, Alberta, hereafter known as the party of the second part.

The party of the first part agrees to commence immediately at a point on the left hand side of number one coal seam, where the second rock tunnel intersects it, on section 15, township 7, range 3, west of the 5th meridian, and blast off 4½ feet off the left hand side and load in mine cars of the coal seam running parallel with the coal seam the quantity of rock the party of the second part requires for their coke oven work this fall.

The party of the first part further agrees to furnish dynamite, caps and fuse for the said blasting.

The party of the second part agrees to pay the party of the first part one dollar and seventy-five cents per cubic yard of twenty-seven cubic feet to be measured in the mine cars.

The party of the second part further agrees to furnish the party of the first part with 60% dynamite at $12.00 per case, dynamite caps at $1.00 per box of 100 caps, blasting fuse at one cent per foot or $1.00 per roll.

The party of the second part further agrees to haul the rock away as promptly as possible after it is loaded and to furnish sufficient air for the operation of the rock drill and to sharpen the rock drills in the blacksmith shop and to keep the rock drill in order.

In witness whereof we have set our hands and seals this 10th day of October, 1910.

(Signatures.)

At the time of the accident there existed an agreement between the company and an assurance company, the name of which the evidence leaves uncertain, whereby the latter appears to have been liable to indemnify the former against any claims for compensation for injuries sustained by its employees. Under agreement, Hamilton gave the assurance company notice of the death of the deceased; and the solicitor of the latter wrote the applicant as follows:—

Frank, 7th September, 1911.

Re Compensation.

Dear Madam,—I have been expecting you to call upon me, as I understand Mr. Hamilton advised you of the assurance company having made an offer of settlement.

It appears that the assurance company claims that you were not wholly dependent upon your late husband's earnings, owing to your keeping a boarding-house; but offer you the sum of $1,000 in full settlement of your claim for compensation. If you would care to call upon me at any time, I shall be pleased to discuss the matter with you.

Yours faithfully,

HARRY C. MOORE.

Hamilton appears to have been aware of this offer by the assurance company at or about the time it was made; but there is nothing in the evidence to shew that he or his company authorised it as an offer on behalf of the latter. The reference to Hamilton in the letter might lead to the view that the assurance company had made a similar offer to the collieries company; but there is no evidence of such an offer having been made.

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Scott, J.

The applicant made no reply to this letter. The solicitor for the collieries company then wrote to the applicant's solicitor as follows:—

Macleod, 11th October, 1911.

Without prejudice.

J. R. Palmer, Esq., Barrister, etc., Lethbridge, Alta.

Reid against Leitch Collieries Ltd.

Dear Sir,—We have been retained by the respondent in the matter under the Compensation Act to defend same. We think this is a case where a compromise would be advisable. We would be prepared to settle the same for $500.

Kindly let us know whether this would be satisfactory to you.

Yours truly,

MACLEOD & GRAY.

This offer was not accepted by the applicant, nor was any reply made by her.

The applicant states that more than two months after the accident she met Hamilton; that then she understood from him that there was going to be a settlement, and that he then stated that he did not see why there should be any trouble over it; that, upon receipt of the letter from Moore, she again saw Hamilton in July, and that he then told her that everything was all right on his side, but that the trouble was with the assurance company, and that he then advised her to see Mr. Farmer, who appears to have been the representative of that company.

The arbitrator (Judge Crawford) awarded the applicant $1,000 without costs. The grounds upon which he made an award in her favour are stated by him, in his reasons for the award, as follows:—

> I take the view that, on the strength of that letter of Mr. Moore's, exhibit D, taken in conjunction with the evidence of Mr. Hamilton, there must have been negotiations between the assurance company and the defendant company in relation to paying this woman; and that evidence is corroborated by her statement, which was uncontradicted, that she was prevented from taking proceedings by reason of the fact that she was assured from time to time by Mr. Hamilton that things were going all right. Her last conversation with him was that he told her everything was all right, as far as he was concerned, and the delay was on account of the assurance company. This looks to me the strongest kind of corroboration that negotiations were pending between the assurance company and Mr. Hamilton, as manager of the collieries company—the defendant company in this action—in regard to paying her compensation, and that is borne out by Mr. Moore's letter offering her $1,000, which was written on behalf of the assurance company. I think that the attitude of the company was such as to preclude them from now setting up the want of notice of accident and notice of claim, or any other objection of that sort, and that the doctrine of estoppel applies.

The remaining reasons stated by him relate solely to the facts which influenced him in fixing the amount of the award.

and in determining the question of costs. The words of the arbitrator which I have quoted appear to me to mean merely that the collieries company was estopped by its conduct from asserting, as it did in its denial of liability, that the applicant had not given the proper notice, required by the Act, of the accident and death of the deceased. If I am correct in this view, it follows that he has not given any reasons for the award in the applicant's favour.

I cannot see that there was anything in the conduct of the collieries company, or of Hamilton, its representative, which would have the effect of making the company liable by reason of the offer of $1,000 made on behalf of the assurance company. By reason of the relations existing between the two companies, the former company could not safely make any offer of settlement without the consent of the latter. It was for the latter alone to consider the question of liability, as the former appears to have been fully indemnified against such liability. The fact that Hamilton may have been cognizant of the offer cannot, in my view, affect the question of his company's liability. I am of opinion, also, that the subsequent offer of $500 made on behalf of the collieries company does not affect the question of the liability, even though it was made, as it probably was, with the consent of the assurance company. It was made without prejudice, and, not having been accepted, the applicant obtains no advantage by it.

One of the grounds relied upon by the collieries company, in its denial of liability, is that the deceased was not a workman within the meaning of the Act. I think it is clear that, by the terms of the agreement between the collieries company and the deceased, under which the deceased was working at the time of his death, he was not a workman within the meaning of the Act. He was not in the employment of the company or in any way under its control. He was a contractor with the company to do certain specified work, in the performance of which the company could not exercise any control over him.

In Ruegg on Employers' Liability, 7th ed., p. 224, the author, in discussing the interpretation placed upon the term "workman" in the English Act of 1906 (6 Edw. VII. ch. 58), says as follows:—

> The test in all cases to be applied to ascertain whether the Act applies is this—not, is there a contract of employment? but is there a contract of service from which a connection of employer and workman or master and servant can be deduced? A contract of service for work or labour, with which alone the Act is concerned, arises where one person undertakes to serve another and to obey the reasonable orders of such other within the scope of the duties undertaken generally, but not specifically defined. If all the duties, though they may be duties of service, are specifically defined, and it is apparent from the construction of the contract that the list is an exhaustive one, and no

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control is reserved over the person undertaking the duties, either as to the manner or time in which he should perform them, the contract is generally spoken of as an independent contract, giving rise to the position, not of master and servant, but of employer and contractor.

A distinction may be drawn between the effect of the interpretation placed by the English Act upon the term "workman" and that placed thereon by our Act; but the words I have quoted appear to be applicable as well to the interpretation in our Act.

Under sec. 6 of our Act, it is only the employer of a workman who is liable for compensation under it; and, as I have already held that the collieries company was not an employer of the deceased, I am of opinion that the award should be set aside and the matter referred back to the arbitrator.

The collieries company should be entitled to the costs of the appeal.

Stuart, J.

STUART, J.:—I think this appeal should be allowed, upon two grounds. First, the basis upon which the learned District Judge found the amount of the compensation was not, in my opinion, a proper one to proceed upon. I cannot see that the company were in any way responsible for an offer made clearly on behalf of the assurance company, with which the collieries company had nothing to do. In the second place, upon the evidence before us and before the District Court Judge, it does not appear that the deceased was a workman, within the meaning of the Workmen's Compensation Act. He was working under a special contract to do certain work, but he was in no way under the control of the company. I think the principle of the decision in *Vamplew* v. *Parkgate Iron and Steel Co.*, [1903] 1 K.B. 851, is applicable to the present case.

The appeal should be allowed with costs, and the case remitted to the arbitrator to be disposed of in accordance with our present decision.

Simmons, J.

SIMMONS, J., concurred.

Appeal allowed.

MERCANTILE TRUST CO. v. CANADA STEEL CO.
(Decision No. 2.)

ONT.

D. C.
1912

June 20.

Ontario Divisional Court, Clute, Sutherland and Lennox, JJ. June 20, 1912.

1. MASTER AND SERVANT (§ II B 3—139)—SERVANT'S ASSUMPTION OF RISK —WALKING UNDER DANGEROUS PLATFORM.

Where a servant was killed by a brick falling through an opening in a platform under which his work did not take him the master is not answerable therefor where the servant had been warned as to and knew the danger of going under the opening, and had been expressly directed to keep away therefrom.

[*Mercantile Trust Co.* v. *Canada Steel Co.*, 3 D.L.R. 518, 3 O.W.N. 980, affirmed on appeal.]

2. DEATH (§ IV—26)—CONTRIBUTORY NEGLIGENCE—WORKMAN—ASSUMPTION OF RISK.

A master is not liable for the death of a servant, notwithstanding the jury found that the use of a certain appliance would have prevented it, although unable to agree that its absence amounted to a defect, where, at the time the servant was killed, he was in a place where his work did not take him, and he had been warned as to, and knew, the danger he ran, and had been expressly warned to keep away therefrom.

[*Deyo* v. *Kingston and Pembroke R. Co.*, 8 O.L.R. 588, and *Barnes* v. *Nunnery Colliery Co.*, [1912] A.C. 44, specially referred to; *Moore* v. *Moore*, 4 O.L.R. 167, distinguished; *Mercantile Trust Co.* v. *Canada Steel Co.*, 3 D.L.R. 518, 3 O.W.N. 980, affirmed on appeal.]

Statement

APPEAL by the plaintiffs, the administrators of a deceased Italian labourer, from the judgment of RIDDELL, J., *Mercantile Trust Co.* v. *Canada Steel Co.*, 3 O.W.N. 980, 3 D.L.R. 518, dismissing the action, which was brought to recover damages for the man's death, caused, as alleged, by the negligence of the defendants, for whom the plaintiff was working at the bottom of a shaft, when a portion of a brick fell down the shaft and inflicted such injuries that he died.

The appeal was dismissed.

A. M. Lewis and *J. R. Sloan*, for the plaintiffs.

J. W. Nesbitt, K.C., for the defendants.

Clute, J.

The judgment of the Court was delivered by CLUTE, J. (after setting out the facts):—The questions put to the jury and their answers are as follows:—

1. Was there any defect in the appliances of the defendants which caused or assisted in causing the casualty?

2. If so, what was it? Answer fully.

3. Was the deceased warned to keep his head from below the shaft? A. By the foremen? A. Yes. B. By Bissett? A. Yes.

4. Did he know that it was dangerous to put his head below the shaft? A. Yes.

5. Was he killed by reason of his putting his head below the shaft? A. Yes.

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6. Was he in his proper place when he was killed? A. No.

7. If he had been in his proper place would he have been killed? A. No.

8. Damages? A. $2,150.

The jury added the following:—

"We consider that, if the shaft had been continued upwards another 6 inches, this accident would not have happened, but we cannot agree whether the absence of this is or is not a defect, nor can 10 of us agree as to this."

Even assuming that the answers to the two first questions were favourable to the plaintiffs, the answers to the remaining questions preclude the plaintiffs from recovering.

The deceased was warned to keep away from the shaft. He knew that it was dangerous; and it was by reason of his doing that which he was warned not to do that he came to his death. He was not in his proper place. Had he been, he would not have been killed. All this is found by the jury, upon sufficient evidence.

Mr. Lewis strongly urged that there was no sufficient finding that the deceased was guilty of contributory negligence. The finding is stronger: it is in effect that he was the cause of his own death, and that with knowledge of the danger and warning not to incur it.

The plaintiffs' counsel strongly relied upon the language of Armour, C.J.O., in *Moore* v. *Moore*, 4 O.L.R. 167, at p. 174, where he says: "A person may be exercising reasonable care, and, in a moment of thoughtlessness, forgetfulness, or inattention, may meet with an injury caused by the deliberate negligence of another, and it cannot be said that such momentary thoughtlessness, forgetfulness, or inattention will, as a matter of law, deprive him of his remedy for his injury caused by the deliberate negligence of the other, but it must in all such cases be a question of fact for the jury to determine." In that case, as the Chief Justice points out, the jury negatived contributory negligence on the part of the plaintiff, finding that he used reasonable care for a boy of his age. There were no findings against him such as in the present case; and, having regard to the facts of that case and the findings of the jury, I think it quite distinguishable from the present.

In *Deyo* v. *Kingston and Pembroke R. Co.*, 8 O.L.R. 588, where the deceased was on top of the car contrary to the rules of the company, of which he was aware, and was knocked from the car by coming in contact with the overhead bridge, it was held that the accident was caused by his own negligence, and the defendants were not liable, although there was not a clear headway space, as required by the statute. This case was distinguished in *Muma* v. *Canadian Pacific R. Co.*, 14 O.L.R. 147.

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MERCANTILE TRUST CO. v. CANADA STEEL CO.

Clute, J.

See also *Findlay* v. *Hamilton Electric Light and Cataract Power Co.*, 11 O.W.R. 46; *Markle* v. *Simpson Brick Co.*, 9 O.W.R. 436, in appeal 10 O.W.R. 9; *Grand Trunk R. Co.* v. *Birkett*, 35 Can. S.C.R. 296; *Bist* v. *London and South Western R. Co.*, [1907] A.C. 209.

In *Barnes* v. *Nunnery Colliery Co.*, [1912] A.C. 44, a boy employed at the colliery jumped into a hoist tub in order to ride to his work. It was a common practice for the boys to ride to their work in this way, and it was expressly forbidden, and the prohibition was in force as far as possible. It was held that the death was caused by an added peril to which the deceased by his own conduct exposed himself, and not by any peril involved in his contract of service.

I think the appeal should be dismissed, and with costs, if demanded.

Appeal dismissed.

QUE.

K. B.
1912

July 26.

France **LAFLEUR** (petitioner for writ of habeas corpus) v. Charles A. **VALLÉE**, Governor of the common jail for the district of Montreal (respondent).

Quebec Court of King's Bench (Crown Side), Gervais, J. July 26, 1912.

1. HABEAS CORPUS (§ I C—12*a*)—RIGHT TO DISCHARGE—WARRANT OF COMMITMENT DEFECTIVE—ABSENCE OF SUMMARY OF NATURE OF OFFENCE.

A warrant of commitment is invalid which does not contain even a summary of the nature and gravity of the offence charged against a prisoner, nor give the name of the presiding magistrate who committed him.

2. HABEAS CORPUS (§ I C—15)—POWERS OF AMENDING INFORMAL WARRANT OF COMMITMENT—ISSUANCE OF PROPER WARRANT.

A prisoner confined under an informal warrant of commitment may be held in custody upon a proper warrant being subsequently issued.

3. OFFICERS (§ II A—75)—POWERS OF CLERKS AND POLICE MAGISTRATE'S OFFICERS TO CORRECT ERRORS AND DEFECTS IN COMMITMENT WARRANTS.

The Crown side of the Court of King's Bench will permit the clerks and officers of the police magistrate of the city of Montreal to correct errors and deficiencies in commitment warrants.

4. COURTS (§ II A 6—178)—JURISDICTION OF COURT SITTING UNDER HABEAS CORPUS ACT—COGNIZANCE OF PROCEEDINGS.

A Court sitting under the Habeas Corpus Act may, without inquiring into the justice of a sentence imposed on a person, take notice of the minutes of proceedings against him in order to satisfy itself that the provisions of the law relating to the warrant of commitment have been observed.

Statement

PETITION of a prisoner upon the return of a writ of *habeas corpus* for his discharge from the common gaol for the District of Montreal, upon the grounds that the warrant of commitment was defective in that it did not bear the name of the magistrate, nor his signature, nor a statement of the nature and gravity of the offence.

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The petition was refused.

L. Houle, for the petitioner.

J. C. Walsh, K.C., for the Crown.

GERVAIS, J.:—The present proceedings have been had, by the consent of counsel representing both parties, in the prisoner's absence.

The petitioner seeks to secure his release from the common gaol for the district of Montreal by means of a writ of *habeas corpus*, alleging that he is therein illegally detained because the warrant of commitment does not bear the name of the magistrate, nor his signature, nor a statement of the nature and gravity of the offence.

The last return made by the respondent establishes that the petitioner was found guilty, on July 9th, 1912, in the Court of the general sessions of the peace for the district of Montreal, of having stolen a quantity of copper wire of the value of fifteen dollars and being the property of the Laval Electric Company, in the parish of L'Epiphanie, in the district of Joliette, the 9th day of July instant.

Upon the day of the return of the present writ, the respondent declared that the petitioner was in his custody under a warrant, signed by E. A. B. Ladouceur, clerk of the Court, the said Court presided over by A. B., and that the petitioner was found guilty of theft.

However, in criminal proceedings had before a jury, or under the provisions respecting speedy trials, the warrant for commitment is simply a copy of the sentence of the Court, entry whereof is made in a register forming part of the archives of the Court, according to 833 and 914 C.C., and form 16 of the same code; or, in cases heard under the provisions respecting summary proceedings or proceedings against children under information and complaint, the warrant of commitment is nothing but the warrant to apprehend, qualified by that name, and signed by the presiding magistrate himself, since no register of record is provided for that purpose, according to 727, 799, 814 C.C., and forms 31 to 36, 55 to 57, and 59 of the same code.

As a consequence, the law requires, under pain of invalidity, that warrants of commitment, for reasons of moral, logical and judicial good order, should briefly recite the circumstances of time, place and persons surrounding the commission of an offence by him who is punished for it and who must serve his sentence either in prison or penitentiary.

In cases of trial by jury or in speedy trials, a register is kept, and it is the duty of the clerk to sign every extract and recite therein not merely the sentence but also the other particulars above indicated.

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In the latter case, the warrant of commitment has been abolished, and, as the law now stands, it has been replaced by a copy of the sentence of the Court. Reference is made, also, to R.S.C. ch. 147, sec. 44, the Penitentiary Act.

In the other above mentioned cases, it is the duty of the presiding magistrate, who does not keep a register, to sign the warrant of commitment and include the same particulars.

In the present case, if the warrant of commitment is validly signed, but it does not contain even a summary of the nature and gravity of the offence, nor the name of the presiding magistrate, it must therefore be considered as invalid for these two reasons. Notwithstanding this, and with the consent of both the Crown and the prisoner, the respondent was permitted to make a supplementary return in which he declares that he detains the prisoner by virtue of a warrant drawn in the form provided by 833 C.C. and form 61 of the same code.

The new warrant of commitment agrees with the sentence and the latter is well-founded and is legal, according to the provisions of the Criminal Code. Reference is made to 833 C.C. and to form 61, and to R.S.C. ch. 147, sec. 147.

A prisoner confined under an informal warrant of commitment may continue to be held in custody if a subsequent proper warrant of commitment is issued. Under the circumstances arising from the wide range and number of criminal cases, requiring prompt attention, which occupy the police magistrates and their clerks and officers in the city of Montreal, this Court should assume the responsibility of permitting those clerks and officers to correct any errors which may, from time to time, occur in the drawing up of warrants of commitment.

A Court sitting under the authority of the Habeas Corpus Act may always, as a necessary consequence, take notice of the minutes of proceedings had in the case and satisfy itself that the provisions of the law relating to the warrant of commitment have been observed, without thereby inquiring into the justice of the sentence ordering imprisonment.

The writ of *habeas corpus* is quashed, and the petition for the release of the prisoner is dismissed.

Discharge refused.

CAN.

Ry. Com. 1912

May 29.

CITY OF HAMILTON v. GRAND TRUNK R. CO.

(Re Shunting on Ferguson Avenue, Hamilton.)

File 18292.

Board of Railway Commissioners, May 29, 1912.

1. EMINENT DOMAIN (§ III B 2—116)—RAILWAY ON STREET—COMPENSATION TO LAND OWNERS—BOARD OF RAILWAY COMMISSIONERS.

The Railway Board may make it a condition of the occupation of a street by a railway company's tracks running along that street, that the railway company should compensate landowners injuriously affected because of the operation of the railway on the highway, if such landowners have not been compensated in some other way.

2. EMINENT DOMAIN (§ IV B—195)—ADDITIONAL SERVITUDE—ABUTTING OWNERS—INCREASE OF TRAFFIC—OWNER OF LAND PRIOR TO CHANGE—COMPENSATION.

Where a railway established a freight shed and freight shunting yard which materially increased the traffic upon that part of the railway running along a city street and injuriously affected the value of the property fronting on the street to an extent not contemplated when the grant was made many years previously by the municipal corporation of permission to carry the railway line along such street, the Railway Board of Canada will order compensation to be paid by the railway to such of the landowners within the territory injuriously affected as were the owners of their property prior to such change of conditions.

3. EMINENT DOMAIN (§ IV B—195)—ADDITIONAL SERVITUDE—PURCHASE OF PROPERTY ON STREET SUBSEQUENT TO CHANGE OF CONDITIONS—NOTICE—COMPENSATION.

Purchasers of property upon a street upon which a railway is operated who bought subsequently to the establishment of a railway yard and the incidental damage to the properties on that street by reason of the shunting of cars thereon, having purchased with notice of the new conditions, are not entitled to compensation in damages as are the landowners who had acquired title previous to the establishment of the railway yard.

Asst. Chief Commissioner.

THE ASSISTANT CHIEF COMMISSIONER (MR. D'ARCY SCOTT): —This is a complaint of the city of Hamilton and some residents on Ferguson avenue to the disturbance created by the Grand Trunk Railway Company shunting trains on that avenue, which has been before the Board on several occasions, and was the last time it was up allowed to stand to give the Grand Trunk Railway Company an opportunity of advising the Board what it proposed to do towards eliminating the annoyance complained of. It appears that the Grand Trunk Railway Company have largely discontinued shunting at night, but as they start work at five o'clock in the morning, this undoubtedly gives just cause for complaint. It is also stated that the constant shunting during the day time is a nuisance, and has the effect of depreciating the value of property on Ferguson avenue within the territory affected by the shunting.

It appears that the predecessor in ownership of the tracks on Ferguson avenue, the Hamilton and Lake Erie Railway Company, was given permission to carry its line of railway along

Ferguson avenue, by the municipal council of the city of Hamilton, in a resolution passed on the 12th February, 1872, which reads:—

> Resolved, that permission be and it is hereby given to the Hamilton and Lake Erie Railway, to carry the line of railway along the whole or such portion as they may see fit, of all or any, or either of the streets in this city lying between Emerald street on the east, Ferguson avenue, Nelson street and Cherry streets on the west, including the said streets named and the streets lying between the northern and southern boundaries of the city, and extending to the westward from Emerald street aforesaid within said limits, and that a copy of this resolution duly certified be delivered by the clerk to the said railway company.

In the year 1904 the Grand Trunk Railway Company established a freight yard and built a substantial freight shed on the west side of Ferguson avenue, known as the Cannon street yard. After the establishment of this yard shunting was commenced on Ferguson avenue to get cars in and out of the Cannon street yard. The volume of this shunting has increased with the volume of traffic handled in the Cannon street yard. This increase has been very substantial, due to the great commercial development in Hamilton within the past few years. The result now is, that such a use of Ferguson avenue, in the neighbourhood of the Cannon street yard, is made by the railway company which was not in contemplation by anyone at the time the permission to carry its line along Ferguson avenue was given to the Hamilton and Lake Erie Railway Company in 1872.

The Board has on more than one occasion, and particularly in the case of Hardisty street, Fort William, made it a condition of the occupation of a street by a railway company's tracks running along that street, that the railway company should compensate landowners injuriously affected, because of the operation of the railway on the highway, if such landowners had not been compensated in some other way.

In the present case, we cannot, of course, review what took place at the time the permission was given to the Hamilton and Lake Erie Railway Company to lay its tracks on Ferguson avenue. I have no doubt at that time the public were so anxious for the establishment of railway facilities that the people of Hamilton, including those who owned land on Ferguson avenue, welcomed the advent of the railway; but, as I have already suggested, the use of the avenue as it is now used by the shunting in and out of the Cannon street yard, is something which was not contemplated by those affected when the arrangement of 1872 was consummated.

I therefore think that those injuriously affected by this shunting should receive compensation. The Grand Trunk Rail-

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way Company should be ordered to compensate them accordingly by paying damages, to be fixed by arbitration if necessary. It may be, that the Grand Trunk can make a more satisfactory arrangement for all concerned by purchasing the lands affected outright, instead of compensating the owners. I think they should have the option of doing either, and that they should be permitted to use the expropriation powers of the Railway Act if they desired to acquire title to the lands affected.

This decision will be for the benefit only of those landowners on either side of Ferguson avenue from Cannon street southerly to Rebecca street, the zone affected by this shunting.

Some of the property on Ferguson avenue, between Cannon street and Rebecca street has changed hands since the establishment of the Cannon street yard. The purchasers of such property bought it with notice of the existing conditions, and therefore are not entitled to compensation. The order should be limited to existing landowners within the territory described who were the owners of their property prior to the establishment of the Cannon street yard.

Comr. Goodeve. COMMISSIONER GOODEVE concurred.

Order for compensation.

B.C.

C. C. 1912

June 14.

BURGOYNE v. MALLETT.

Vancouver County Court, B.C., Judge Grant, County Judge.
June 14, 1912.

1. LANDLORD AND TENANT (§ III E—117)—NOTICE TO QUIT—REASONABLE LENGTH OF TIME—SUFFICIENCY.

In the absence of a statutory requirement as to the length of notice for the termination of a tenancy from month to month, only a reasonable notice of intention to terminate the tenancy is necessary.

[*Jones* v. *Mills*, 10 C.B.N.S. 788, followed.]

2. LANDLORD AND TENANT (§ III E—117)—WHAT IS REASONABLE NOTICE OF TERMINATION OF TENANCY.

A half month's notice of termination of a tenancy from month to month is reasonable, where the landlord knew the tenant was looking for a cheaper place because he could not afford to pay the rent the former demanded, and will be sufficient in the absence of a statutory requirement of a longer notice.

3. LANDLORD AND TENANT (§ III D—99)—LIABILITY OF TENANT FOR RENT AFTER SURRENDERING PREMISES AND GIVING NOTICE TO QUIT.

A tenant who surrendered demised premises at the middle of a month, and at the same time gave notice of the termination of the tenancy, is liable for a full month's rent.

4. LANDLORD AND TENANT (§ III A—43)—RIGHT OF TENANT TO COMPENSATION FOR REPAIRS.

A tenant who has not covenanted or agreed to make repairs is entitled to compensation for making repairs on demised premises only when made at the request of his landlord.

ACTION for a month's rent in lieu of notice to quit.

Judgment was given for plaintiff.

W. C. Brown, for the plaintiff.

H. S. Cayley, for the defendant.

GRANT, Jun. Co. Judge:—The premises in question were let by the plaintiff to the defendant for $22.50 per month, payable in advance, the term beginning on the 17th of the month. The tenancy continued for some months, the defendant during the said time having on more than one occasion called the plaintiff's attention to the fact that the rent was greater than he was able to pay, and that he would have to get a cheaper rent.

On the 2nd April, 1912, the defendant, having succeeded in getting a cheaper rent, moved out, and at once notified the plaintiff, and returned him the key, in the envelope with the notification aforesaid; and, some few days later, paid up the rent to the time of moving out.

The plaintiff contends that he was entitled to one month's notice of intention to terminate the tenancy, and in lieu of that to one month's rent for the same.

There is no statutory enactment in British Columbia dealing with the length of notice for the termination of such a tenancy, and very little authority that I have been able to find under the common law.

In *Jones* v. *Mills*, 10 C.B.N.S. 788, at p. 795, Erle, C.J., says:—

> I also think a tenant holding, having held for several years (on a weekly tenancy), is not liable to be turned out at the end of any week without notice. . . . The rule which applies to tenancies from year to year has never, it seems, been extended to the case of a weekly or monthly tenant; but, though it has been laid down that a weekly or monthly tenancy does not require a week's or a month's notice to terminate it, unless there be some special agreement or some custom, I do not find that any person has ever held that the interest of a tenant so holding may be put an end to without any notice at all. Some notice must be necessary.

In the same case Williams, J., says, at p. 797:—

> I apprehend that in either case there must be a legal expression of intention that the tenancy should cease. There is certainly no direct authority on the subject.

Willes, J., also says, at p. 797:—

> I have no doubt that the inference of law arising from a contract of tenancy like this, is, that it should continue from week to week until put an end to by the one party or the other expressing his dissent to its continuance, and that such dissent cannot be expressed so as to put an end to the tenancy before the end of the current week. I am ready to adopt that view; but, as a matter of law, to say that a week's notice is necessary is a proposition I am not prepared to assent to.

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Byles, J., in the same case, says:—

> It seems to me that the same convenience which dictates the notice there (a yearly tenancy) makes it also necessary that a tenancy from week to week should be determined only on reasonable notice. It may be that the law has not yet determined what that notice shall be. The state of the authorities seems to be this: there is some authority for saying that a week's notice is not necessary, but there is no authority defining what notice *is* necessary. I would rather decide the present case on the ground that no notice at all was given, whereas the law requires a reasonable notice.

This, I take it, is the state of the law in British Columbia to-day.

Adopting the law as laid down by Willes, J., as above, that the dissent cannot be expressed so as to put an end to the tenancy before the end of the current week or term, the notice given on the 2nd April could not work a termination of the tenancy before the end of the term—the 17th April—and not then unless the notice was reasonable. The question is, was the half month's notice reasonable in this case? I think so, as the plaintiff was aware that the rent was more than the defendant felt himself able to pay. He knew that the defendant was endeavouring to get a cheaper rent, and might, if he desired, have terminated the tenancy, on due notice, and got a more stable tenant. The defendant, in my judgment, is liable to pay rent for the month ending the 17th April; as, having paid up only till the 2nd April, there was a half month's rent due to the plaintiff.

The defendant counterclaims $14 for certain repairs done. A part of this work was done, as I gather from the evidence, with the acquiescence, yes, more, at the request, of the plaintiff; and, from the facts adduced, I think the plaintiff was unreasonable in not accepting the needed improvements as made in satisfaction of his claim for the rent for the unexpired month. As it appears to me, certain repairs were made by the defendant without the request of the plaintiff; and, as a discouragement to tenants in making repairs without request, I shall give judgment for the plaintiff for $11.25, and for the defendant in the same amount, and there will be no costs to either party.

Judgment for plaintiff.

THE GRAND TRUNK RY. CO. OF CANADA v. McDONNELL.

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June 15.

Quebec Court of King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Lavergne, Cross and Gervais, JJ. June 15, 1912.

1. DAMAGES (§ III I—192)—MEASURE OF DAMAGES FOR NEGLIGENCE CAUSING PERMANENT INJURIES—QUEBEC WORKMEN'S COMPENSATION ACT.

Under the Quebec Workmen's Compensation Act the annual payment to be made for permanent disability is one-half of the average yearly wage of which the injured party is deprived by reason of such incapacity.

2. DAMAGES (§ III I—192)—PERMANENT DISABILITY—OPTION UNDER QUEBEC WORKMEN'S COMPENSATION ACT—CAPITALIZATION OF INCOME.

The workman entitled to a permanent disability claim under the Quebec Workmen's Compensation Act has the option of accepting the annual income specified in the Quebec Workmen's Compensation Act or else demanding that the capitalization thereof be handed over to an insurance company in order to purchase an annuity therewith, but such capitalization may never exceed $2,000.

3. DAMAGES (§ III P—331)—LOSS OF WAGES—PROPOSED RECOMPENSATION BY EMPLOYER—RIGHT TO COMPENSATION UNDER QUEBEC WORKMEN'S COMPENSATION ACT.

A reduction in wage earning capacity is to be established according to the ordinary rules, and the employer cannot, by offering a higher wage or a new employment at the old figures, prevent the workman from obtaining compensation under the Quebec Workmen's Compensation Act.

Statement

APPEAL from a judgment of the Superior Court, Tellier, J., rendered on November 21st, 1912, maintaining plaintiff's action and condemning the appellant to pay him an annual rent of $210 as damages resulting from permanent partial disability following on an accident.

The appeal was dismissed with costs.

Argument

A. E. Beckett, K.C., for the appellant:—The plaintiff after the accident offered to take back respondent into their service at the same wages as before the accident (loss of an arm), shewing that respondent's usefulness was not impaired and his wage-earning capacity not reduced. In the second place, there is error in fixing the annual rent at $210, seeing sec. 2 (*c*) of the Act provides that the capital of the rent shall not exceed $2,000, which at legal interest can yield $100 only, and not $210: *Gagné* v. *Dominion Chemical Co.*, Que. 13 P.R. 14; *Ferland* v. *Ranfall et al.*, Que. 13 P.R. 69.

J. W. Cook, K.C., for respondent:—It is not disputed that the loss of the right arm occasions a partial and permanent incapacity and the appellant's offer of re-employment cannot deprive the respondent of the relief to which the respondent is entitled. If the appellant's view were adopted there would be grave danger of a workman being defrauded of his recourse by the simple expedient of a re-engagement at old wages for a few months, and then dismissing the employee: Walton, p. 123;

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Foran, p. 81, sec. 329; Fuzier-Herman, vol. 32, p. 968 (1953); Dalloz, 1900-2-232, *ibid.*, 1900-2-453, *ibid.*, 1902-2-451. In determining the rent payable to the injured workman two elements only are to be considered: 1st, the wages earned before the accident, and 2nd, the wages which the workman may expect to earn after the accident: Walton, pp. 126, 127; Foran, p. 81, sec. 328; Sachet, 5th ed., vol. 1, sec. 538; Dalloz, 1900-2-230, *ibid.*, 1900-2-253. The tables and figures as to diminution of capacity have been compiled by Sachet, Accidents du Travail, 5th ed., p. 314, sec. 539, and Fuzier-Herman, vol. 32, p. 968, sec. 1954, and have been followed in *Vigneault* v. *Brouillard*, Que. 40 S.C. 42, and in *Glover* v. *Otis-Fensom Elevator Co.*, Archer, J., April 7th, 1911.

Beckett, K.C., in reply.

Montreal, June 15, 1912.

The following opinion was handed down.

CROSS, J.

CROSS, J.:—The respondent's right under the Act (9 Edw. VII. ch. 66) is to a rent "equal to half the sum by which his wages have been reduced in consequence of the accident": sec. 2 (b).

The appellant says that his wages have not been so reduced at all. If that be true, it follows that the respondent can claim nothing under the Act.

To prove that it is true, the appellants produced their own offer to employ the respondent at better wages than he was earning at the date of the accident. But does the fact that one employer is willing to pay the respondent such wages prove that what the English version of the Act calls his "wages" have not been reduced in consequence of the accident? Some inferential support is given to the appellant's contention by the decision in *Eyre* v. *Houghton Main Coll. Co.*, [1910] 1 K.B. 695, 26 Times L.R. 302, 102 L.T. 385, 79 L.J.K.B. 698, but it is not a case directly in point. The respondent has cited: Walton, p. 123; Foran, No. 329 D, p. 1900-2-232, *ibid.*, 1900-2-453, *ibid.*, 1902-2-451; 32 Fuz.-Herm. p. 968 (1953). A surgeon has testified that respondent's earning power is diminished seventy-five per cent. The appellant says that we have not to do with earning power, but with "wages." This answer proves too much. Clearly there is no procedure or act of reducing wages in consequence of an accident. It is true that the Act speaks of reducing and that reducing literally means bringing down from one amount to a lesser amount, and this reducing is spoken of as being in consequence of the accident. That being so, I agree with Dean Walton and the French decisions cited by counsel for the respondent, that the word "wages" in section 2 means earning power; and I think that this view is strengthened by sec. 19. The making of an agreement by master and servant whereby, notwithstanding

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the injury, it would be arranged that the service would be continued and the old rate of wages kept on would involve the creation of a legal relation different from that provided for by the Act. It would be a legal relation terminable at will, whereas the legal relation created by sec. 2 is not so terminable.

I therefore consider that the appellant did not destroy the proof of reduction of "wages" made for the respondent.

The other ground of appeal is that the yearly rent of $210 adjudged by the Superior Court is more than the Act authorizes the Court to fix.

The appellants' case, on this head, rests upon the concluding clause of sec. 2, which reads: "The capital of the rents shall not, however, in any case, except in the case mentioned in art. 5" —not here in question—"exceed two thousand dollars." We have been referred to annuity tables to prove that $2,000 cannot yield a rent of $210 per year.

That, however, does not make out a case for the appellant. If it were to happen that two years hence the respondent's wages came up to the rate which he earned before the accident and there were to be a revision under the Act, the appellant may find itself much better off than if it had paid a capital of $2,000. The maximum of capital is fixed not upon the footing of an ordinary annuity, but subject to the contingencies provided for in the Act. If the plaintiff considers his chance of being able to collect the rent from his employer for an indefinite period in future, he can elect to have a lump sum set aside as capital, but in that case he must be satisfied with what a capital of not more than $2,000 will yield.

Besides, it is for the Court to apply the measure supplied by the Act itself, namely: "half the sum by which his wages have been reduced." If we were to read into the Act the inference for which counsel for the appellant argues we would not be giving that measure.

I consider, therefore, that the second ground of appeal is not well founded and would dismiss the appeal.

Appeal dismissed.

QUE.

K. B. 1912

June 17.

AUDET et al. v. JOLICOEUR.

Quebec King's Bench (Appeal Side), Trenholme, Lavergne, Cross, Carroll, and Gervais, JJ. June 17, 1912.

1. EVIDENCE (§ VI E—535)—ADMISSION OF PAROL EVIDENCE TO SHEW THAT WRITING DOES NOT CONTAIN ALL THE CONDITIONS.

Parol testimony is not admissible in contradiction of the contents of a writing, but the complete admission of the opposite party may be allowed as proof of a condition not expressed in the writing; the party himself may very well admit and acknowledge that the writing which is validly made does not contain all the conditions agreed upon.

2. LANDLORD AND TENANT (§ II B 2—15)—LEASES — IMPLIED PROHIBITION —LEASE FOR DESIGNATED PURPOSE—RIGHT TO BUILD.

One who leases land for a purpose which does not involve building, cannot build thereon, for the destination of the thing leased is agreed upon, and there is an implied prohibition against using it for any other purpose.

3. PARTNERSHIP (§ II—8)—RIGHTS AND POWERS OF PARTNERS IN GRANTING LEASE OF PARTNERSHIP PROPERTY.

Where one who desires to obtain a lease of land from a partnership firm is refused by two of those connected with the firm, on the ground that he intends to use the land for a saw-mill, and subsequently obtains a written lease from another partner by concealing his real intention and representing that he wants the land for a lumber yard, he will be restrained from erecting a saw-mill upon the land, even though the written lease be unconditional.

4. INJUNCTION (§ I E—42)—RIGHT OF LANDLORD AGAINST TENANT—INDEPENDENT ACTION TO RESTRAIN WITHOUT CLAIMING CANCELLATION OF LEASE.

An action by a lessor for an injunction restraining a lessee from using the land demised in a manner contrary to the lease, may be maintained as an independent action, without the addition of a prayer for the cancellation of the lease.

[*McArthur* v. *Coupal*, 16 Que. S.C. 521, distinguished, and dictum therein disapproved; *Wilder* v. *City of Quebec*, 25 Que. S.C. 128, and *Rheaume* v. *Stuart*, Que. 20 K.B. 414, referred to. See also Mignault, Le Droit Civil du Bas-Canada, vol. 7, p. 290.]

5. COVENANTS AND CONDITIONS (§ III C—36)—LANDLORD—RESTRICTIONS AS TO USE OF DEMISED PROPERTY—BREACH—INJUNCTION.

An action by a lessor for an injunction restraining a lessee from building upon the land demised in breach of the terms of the lease may be maintained without proof of damage to the lessor.

Statement

AN appeal by the plaintiffs from the judgment of Pelletier, J., refusing plaintiffs an injunction against defendant.

The appeal was allowed, Lavergne, J., dissenting.

P. L. Faribault, for appellant.

L. Morin, for respondent.

Quebec City, June 17, 1912. The judgment of the majority of the Court was delivered by

Carroll, J.

CARROLL, J.:—Jolicoeur leased from Audet and others a certain lot of ground situate near the St. Sabine station, near the Quebec Central railway line. The lease was drafted by Audet, and reads as follows:—

La dite compagnie loue un terrain formant environ un arpent, de forme irrégulière, pour cinq ans, à partir de la route de Ste-Sabine, borné au sud par le terrain du Québec Central, au nord et au nord-ouest par la dite compagnie, pour le prix de vingt piastres par année annuelement. Si ce terrain forme plus qu'un arpent, il paiera le surplus en proportion jusqu'à deux arpents s'il lui est nécessaire et si le terrain s'y trouve défriché, avec garantie de tout trouble quelconque en foi de quoi nous avons signé les présentes.

(Sgnd.) AUDET, CHABOT, PILON & CIE.
par J. C. AUDET.
CHARLES AUDET.
J. A. JOLICOEUR.

Before the signing of the lease Jolicoeur had tried unsuccessfully to lease this lot from Chabot and Potvin, the first-named being the manager of the Audet Co. and the second, one of the partners in said company.

The reason for which Chabot and Potvin did not want to lease is that Jolicoeur had told them he intended to build a saw-mill on this ground. This same company had already leased a lot nearby to one Couture, who had undertaken to saw all the company's wood. Another reason given is that there was danger of fire owing to the proximity of forest.

It is also proven that Jolicoeur, before signing this lease, had taken steps to acquire a barker, and subsequently to the signing of the deed had bought an ordinary saw to saw logs.

After the lease had been signed he began to build a mill and did the masonry work thereon.

Audet et al., on October 27th, presented to a Judge in Chambers, a petition for an interlocutory injunction enjoining Jolicoeur from continuing this work. This petition was granted and was to have been served at the same time as the writ which issued on the 28th of October.

The declaration annexed to the writ concluded as follows:—

That the interlocutory injunction issued in this cause be confirmed and declared absolute and perpetual, and that a peremptory and perpetual injunction be, therefore, issued ordering the cessation of these works; that this Court be pleased to order the defendant to demolish within eight days from the service of judgment upon him, every part of the said mill which may have been built up at the time of the service of these presents, failing which that the plaintiffs be authorized to have the said demolition made at the defendant's expense, with costs.

The reasons invoked in support of the petition and of the action are, that Jolicoeur concealed his intention to build a mill on this lot, and that on the contrary, he declared to Audet that the lot was desired for a lumber-yard, on which he would put up a small camp for his men, and that without such fraud the lease would never have been signed by Audet.

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Jolicoeur pleads that the lease is without condition; that the destination of the premises has not been changed; that the plaintiffs are without interest, and that the procedure is illegal, as they did not pray for the cancellation of the lease.

It is true that the lease does not contain any condition forbidding Jolicoeur from building a mill, but when he was in the witness-box Jolicoeur was asked:—

> Q. Did you tell Mr. Audet why you wished to lease this ground?
>
> A. Well, we mentioned it was to place wood in, and build a small camp; I could not tell everything that was said in the office, but a writing and agreement was made. The agreement contains the conditions of the lease.
>
> Q. Was there any question in your *pourparlers* of the building of a mill?
>
> A. But there was nothing about what would be done later; I could not tell him that.

Yet it must be noticed that a few minutes before he had been asked:—

> Q. Did you go and see this machinery (of the mill) before or after you signed the contract with Mr. Audet?
>
> A. I went before and after.

As will be seen, therefore, when he went to sign the contract he was already in *pourparlers* for the purchase of machinery for a mill, and in spite of this he claims that at the time of the contract there was no mention of what would be done later. He also admits having told Audet that the ground was intended for a lumber yard.

Under the circumstances, can this admission be joined to the contract in order to complete the conditions which are not expressed therein?

It seems to me that it may.

Parol testimony is not admissible to prove beyond or against the contents of a writing. But the complete admission of the opposite party may be allowed as proof of the condition not expressed in the lease. The party himself may very well admit and acknowledge that the writing which is validly made does not contain all the conditions agreed upon.

And if this admission makes legal proof then the lease must be read as containing a condition of the destination of the ground as being for a lumber yard and a small camp.

Could the defendant so change this destination, and may he allege the lack of interest of the plaintiffs?

Article 1626 C.C. says the principal obligations of the lessee are:—

> To use the thing leased as a prudent administrator for the purpose only for which it is designed, and according to the terms and intention of the lease.

Mignault, vol. 7, p. 300, says:—

> Lorsque les clauses du bail déterminent la destination de la chose, le locataire ne peut se servir de la chose que pour l'usage *exprimé par le bail*. Par exemple, si voulant bonifier un champ, je l'ai donné à ferme à un laboureur afin qu'il y fasse du sainfoin et de l'avoine, il ne lui est pas permis d'y semer de l'orge ou d'autres grains.

When the conditions of user are not expressed the circumstances of the case must be taken into account.

The authors, amongst others, Beaudry Lacantinerie, say that in such a case the installation of the machinery necessary to the industry carried on by the lessee is not prohibited, as it does not entail a modification in the form of the thing leased.

In the present case, however, we are not dealing simply with machinery, but with the erection of a building, as masonry walls were being put up, and Beaudry Lacantinerie says (2 ed., 2 Louage, No. 646):—

> Si le bail ne dit rien des constructions, elles sont interdites au preneur, car elles modifieraient la forme de la chose louée. L'interdiction de faire des constructions est donc en principe, une clause inutile; elle ne produit pas de conséquences particulières.

But it is not necessary in this case to decide whether this general principle applies, because the destination of the thing leased was agreed upon between the parties, and although there is no written prohibition to build, this prohibition must necessarily be implied. The prohibitive clause is implied.

A person who leases a lot of ground for the purpose of a lumber yard cannot build thereon, for the destination of the thing leased is agreed upon. There is an implicit prohibition to use it for any other purpose.

The defendant says that the plaintiffs have no interest, and without interest there is no action.

In such cases as these prejudice results from the violation of the contract entered into between the parties, and as Beaudry Lacantinerie very properly remarks, relatively to the sanction of obligations flowing from a lease, vol. 1, p. 318, No. 601, it would be an erroneous solution to allow the action only in a case where the user contrary to the destination of the thing leased, caused damage to the lessor.

> Cette solution suffit, du reste, pour condamner la doctrine qui la formule car il est contraire aux principes les plus élémentaires que les dommages-intérêts résultant de l'inexécution d'une obligation soient subordonnés à un préjudice dont le créancier serait victime.

But the defendant makes a serious objection as to the form of the procedure.

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An interlocutory injunction is only accessory to the action and the action does not pray for the cancellation of the lease; the conclusions are the same as those of the petition for injunction.

I must say at once, however, that the action goes beyond the conclusions of the petition and prays for the demolition of the work already done.

This injunction procedure is not unknown in France, although it does not there exist in the same form as here. In France there is an action which would lie to order, as in this case, the demolition of the works.

It has been held, it is true, that an interlocutory injunction is a conservatory measure, and the accessory of a principal action, and the decision in *McArthur* v. *Coupal*, Que. 16 S.C. 521, is probably correct, in so far as that case is concerned; an action in damages. But the general principles laid down therein are contrary to the letter and to the spirit of our law. For example, one of the Judges who gave his opinion goes as far as saying that a Judge cannot grant the petition before the writ of summons has been shewn him, as if our article 957 C.P. required a writ to be issued beforehand.

Mr. Justice Cimon properly dealt with this erroneous contention in the case of *Wilder* v. *The City of Quebec*, Que. 25 S.C. 128.

It is correct to state that the new code of procedure abolished the writ in injunction as a principal demand?

Such was certainly not the intention of the codifiers who declared that they were extending the scope of this useful remedy.

If the opinion expressed in *McArthur* v. *Coupal*, Que. 16 S.C. 521, were to obtain, the scope would have been restricted, and not extended, for, under the old code the injunction existed as a main action, and sometimes as a conservatory measure. Only it was inserted in the writ itself, whereas to-day it forms an order annexed to the writ.

We repeat our opinion, as expressed by Mr. Justice Cross in *Rheaume* v. *Stuart*, Que. 20 K.B. 414.

> It is a mere question of language or words, whether the injunction is an independent action or a mere accessory of what may be called a common law action. It can hardly be seriously contended that a demand for an injunction to restrain breaches of a written agreement, or infringement of trade mark rights, or breaches of a partnership deed, would not constitute an action by itself.

As to the defendant's objection to the effect that a resiliation of the lease should have been demanded, I will answer that a chapter dealing with the proceedings between lessors and lessees is not to be construed as containing an exclusive remedy,

and that the common law procedure for the maintenance of their rights is not taken away from lessors and lessees.

L'emploi de ce mode particulier de procédure, (says Mr. Mignault, vol. 7, p. 290), n'est cependant que facultatif.

I am of opinion that Jolicoeur used the ground leased to him in a way which was contrary to the user agreed upon by the parties, and that the injunction should have issued, and the appeal is therefore allowed.

LAVERGNE, J., dissented.

Appeal allowed.

Re McGILL CHAIR CO.; MUNRO'S CASE.

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1. CORPORATIONS AND COMPANIES (§ V A—168)—BONUS STOCK OR SHARES SOLD AT A DISCOUNT—ONTARIO COMPANIES ACT, 2 GEO. V. CH. 31.

A company organized under the Ontario Companies Act, R.S.O. 1897, ch. 191, cannot issue shares of capital stock at a discount or as a bonus.

[*Ooregum Gold Mining Co.* v. *Roper*, [1892] A.C. 125, and *Welton* v. *Saffery*, [1897] A.C. 299, followed.]

2. CORPORATIONS AND COMPANIES (§ V F 4—276)—LIABILITY OF HOLDER OF BONUS SHARES IN LIQUIDATION PROCEEDINGS.

A person to whom company shares are issued as a bonus and who, with his acquiescence, was treated by the company as a shareholder, is liable in liquidation proceedings for the par value of such shares.

[*Welton* v. *Saffery*, [1897] A.C. 299, and *Re Cornwall Furniture Co.* (1910), 20 O.L.R. 520, followed; *Re Matthew Gay Carriage and Auto Co., Thomas' Case* (1912), 1 D.L.R. 642, 3 O.W.N. 902, distinguished.]

3. CORPORATIONS AND COMPANIES (§ V F 3—267)—EFFECT OF RESOLUTION RECALLING ALL STOCK CERTIFICATES ISSUED AS A BONUS—LIABILITY OF SHAREHOLDER.

One to whom company shares are illegally issued as a bonus, is not relieved from liability to pay their par value, by the adoption of an *ultra vires* resolution by the shareholders to the effect that all stock certificates regarded as a bonus be recalled into the company, pursuant to which resolution, there was an attempted cancellation of the shares.

[*Ooregum Gold Mining Co.* v. *Roper*, [1892] A.C. 125, and *Bellerby* v. *Rowland and Marwood's Steamship Co.*, [1902] 2 Ch. 14, followed.]

4. CORPORATIONS AND COMPANIES (§ V B—178)—CANCELLATION OF ALLOTMENT—ILLEGAL SHARES—BONUS—MISTAKE OF LAW.

One who accepts shares of company stock as a bonus cannot, upon discovering their illegality, have their allotment cancelled on the ground that they were issued under a mistake of fact, since, if there was any mistake, it was one of law.

[*Ex p. Sandys* (1889), 42 Ch. D. 98; *Welton* v. *Saffery*, [1897] A.C. 299, and *Re Cornwall Furniture Co.* (1910), 20 O.L.R. 520, followed; *Burkinshaw* v. *Nicolls* (1873), 3 App. Cas. 1004, distinguished.]

5. CORPORATIONS AND COMPANIES (§ V A—170)—RIGHT OF COMPANY TO ALLOT FRACTIONAL SHARES—LIABILITY OF SHAREHOLDER ON.

A company organized under the Ontario Companies Act, R.S.O. 1897, ch. 191, is not empowered to allot half shares of stock, and a person to whom the company purported to allot two and one-half shares is liable for two shares only.

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RE MCGILL CHAIR CO.

Statement

AN appeal by the liquidator of the company from an order of the Local Master at Cornwall, dated the 12th September, 1911, refusing to settle the name of Munro, the respondent, on the list of contributories in respect of two shares and one half-share of the capital stock of the company, upon a reference for winding-up under the Dominion Winding-up Act.

November 20, 1911. The appeal was heard by MEREDITH, C.J.C.P., in the Weekly Court at Toronto.

George Wilkie, for the liquidator.

J. A. Macintosh, for the respondent.

Meredith, C.J.

April 17, 1912. MEREDITH, C.J.:—The facts, as far as they are material to the question for decision, are undisputed, and are: that the respondent was asked by McGill, a director of the company, to subscribe for shares, and was promised seven and a half fully paid-up shares of $100 each, for $500; and he was advised by Pitts, another director, to do so. The respondent agreed to take the shares on these terms, and accordingly subscribed for them and paid the $500, receiving on the 16th January, 1907, a stock certificate describing the shares as fully paid-up.

This transaction was not an isolated one; for, as I understand, all the shares issued by the company were subscribed for and allotted on the same terms.

All parties acted in good faith and under the belief that the transaction was one into which the company might lawfully enter.

A resolution of the directors had been passed on the 31st October, 1906, "that services in connection with the promotion and organisation of the McGill Chair Company be paid for in fully paid-up shares of the stock of the company, and that certificates be issued for the same."

Instead of allotting bonus shares to the persons who had rendered the services mentioned in the resolution, the plan was adopted of giving to each person who subscribed for shares three shares for every two for which he paid, or at that rate: the additional fifty per cent. being provided by the shares the issue of which was authorised by the resolution.

Although this was the plan adopted, Munro was treated in the books of the company as having subscribed for five shares, and paid for them with the $500, and as holding two and a half shares paid for by "services rendered in connection with promoting this company."

The respondent, on the 24th April, 1908, gave a proxy to Mr. Campbell to vote for him at a shareholders' meeting to be held on the 27th of that month, and in it he described himself as the holder of seven and a half shares; and the respondent himself attended two of such meetings.

In January, 1910, the company, as the learned Master puts it, was in deep water financially.

Some of the shareholders, to whom shares had been allotted on similar terms to those on which the respondent's shares were allotted to him, had, about a year before this, learned of the illegality of the transaction, and demanded that the certificates which had been issued to them should be cancelled and new certificates issued for the shares for which they had fully paid in cash. These demands and occasional threats of legal proceedings to enforce them continued during the year preceding the passing of the resolution to which I shall next refer.

On the 14th January, 1910, at a meeting of the shareholders it was resolved:

> That all stock certificates which have been regarded in the light of bonus stock be recalled into the company, and whereas Thomas McGill performed special services in connection with the promotion of the company is desirous of retaining his stock that he may be exempt from the above resolution.

The respondent made no separate demand to have his bonus shares cancelled, but he was present at this meeting and voted in favour of the resolution.

In pursuance of this resolution, the stock certificates, except McGill's, were called in and cancelled, and on the 22nd January, 1910, a new certificate was issued to the respondent for five fully paid-up shares.

In the view of the Master, the respondent, in accepting the seven and a half shares, acted under a mistake of fact; and, having repudiated the bonus shares, as the Master found, as soon as he became aware of the mistake, he was entitled to have the allotment of them cancelled, as was done.

The mistake under which, as the Master thought, the respondent acted was in believing that the seven and a half shares were, as they were represented to be, fully paid-up.

I am unable to agree with this view. The mistake of the respondent was not, in my opinion, a mistake of fact, but a mistake as to the law.

It is not like the case of *Burkinshaw* v. *Nicolls* (1878), 3 App. Cas. 1004, where the company was held to be estopped from alleging that the shares were not fully paid-up, by the certificate which it had issued, and on the faith of which a third person had purchased the shares from the person described in the certificate as being the owner of them, stating that they were fully paid-up.

The respondent dealt directly with the company, and knew that he was purchasing from it shares that had not been issued to any one else, but were being issued then for the first time; and the mistake under which he laboured was the belief that the

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company had a right to issue shares to him at a discount of one-third of their face value, for that was the effect of the transaction.

The position of the respondent is well described by what was said by Bowen, L.J., in *Ex p. Sandys* (1889), 42 Ch. D. 98, 117. The defendant in that case sought to have the register rectified by striking out her name in respect of six hundred and seventy-three shares issued at a discount, and the money she had paid in respect of them repaid to her. "The question," said the Lord Justice, "is, whether the respondent, whose name is upon the register, has agreed to become a member. The original contract under which she applied for shares was not one that, as long as it rested *in fieri*, could have been enforced. She applied for shares to be given to her coupled with a condition which the law would not recognise, and the company had no right, disregarding the condition, to force upon her something which she had not asked for. If the case stood there, there would have been an end of the matter. The original contract was not one which could have been enforced, and in giving her the shares without attaching the condition to them, which she made a portion of her offer, the company were not giving her what she asked for. But the matter does not rest there, and this is just the point of the case. After her name was placed on the register and after she knew that her name was on the register, she did certain acts which were only consistent with an intention on her part to be treated as a member of the company, and to treat herself as a member of the company in respect of these particular shares which had been so appropriated to her. If that is not evidence of an agreement to be a member, I really do not know what is." Lindley, L.J., in the same case (p. 115), says:—

> There never has been from the beginning to the end any mistake on her part about the facts. Such a mistake as there has been was a mistake by her, if any, as to the legal effect of what she has done. She has not taken these shares on the theory or supposition that they were in fact paid-up to the full extent of £5. She knew all the time that they were not paid-up, and were never intended to be paid-up. No doubt she thought, not knowing the law, that she never would have to pay the balance. . . Now the moment she gets these shares and finds she is on the register, what does she do? Does she repudiate? Assume she might, but does she? Quite the reverse; being still in ignorance, as she says, of her rights—not in ignorance of any material fact, but being still in ignorance, or under an erroneous impression as to the legal effect of what she is about—she treats herself as a shareholder in respect of these shares.

And Cotton, L.J., points out (*Ex parte Sandys* (1889), 42 Ch.D. 98 at p. 113) that there was in the case what was wanting in *In re Almada and Tirito Co.* (1888), 38 Ch. D. 415, namely, the assent of the shareholder to her name being on the

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register in respect of the shares; and he distinguished *Beck's Case* (1874), L.R. 9 Ch. 392, saying that "the mistake on which the applicant was there relying was not a mistake in law, but a mistake in fact;" and, after a reference to the facts of that case, he added: "If there had been a mistake of the general law of the country, he could not have been relieved. But what the Lords Justices held was, that he was entitled to have his name struck off the register because he had been put on under a contract entered by him under a mistake in fact, of which he was entitled to have the benefit."

In *Welton* v. *Saffery*, [1897] A.C. 299, the shares had been issued at a discount, and it was held that the holders of them were not released from liability in a winding-up to calls for the amount unpaid on their shares, for the adjustment of the rights of the contributories *inter se*, as well as for the payment of the company's debts and the costs of winding-up. Speaking of the nature of the transaction, Lord Macnaghten said (pp. 321-2):

> The truth is, as it seems to me, that there never was a contract between the company or the shareholders, on the one hand, and the persons to whom these discount shares were offered, on the other. There was an offer by the directors purporting to act on behalf of the company, but it was an offer of that which the company could not give, because the law does not allow it. There was an acceptance by the discount shareholders of that offer. But that offer and acceptance could not constitute a contract. Both parties acted under a misconception of law, and the whole thing was void. The company, however, placed the names of the discount shareholders on the register; they allowed their names to remain there until their remedy against the company was gone; and now they cannot be heard to say that they were not shareholders.

Ex p. Sandys, 42 Ch.D. 98, was followed by Britton, J., in *Re Cornwall Furniture Co.* (1910), 20 O.L.R. 520, and his decision was affirmed by the Court of Appeal. The question in that case was as to the position of persons to whom bonus shares had been issued; and, dealing with it, the Chief Justice of Ontario said (p. 533):—

> It is now too late for these persons to ask to be relieved from their position as holders of the shares which they thus acquired. No doubt, they acted under a mistaken belief, but that fact does not suffice to entitle them to be relieved. Having assented to the allocation of the shares and accepted the position of holders in respect of them, they cannot be relieved from the liability attached to the position simply because they made a mistake in the general law. There is no question that the facts were fully known to them.

In the *Cornwall* case [*Re Cornwall Furniture Co.*, 20 O.L.R. 520], the question arose after an order for a winding-up of the company had been made; and I refer to it only for the purpose of shewing that a mistake such as that

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under which the respondent laboured is a mistake as to the law, and not a mistake as to facts.

In the English cases it will have been noticed that the assent of the shareholder to his name appearing on the register of shareholders is spoken of as the determining factor for fixing him with liability as a shareholder; and in the case at bar there is nothing to shew that the respondent knew that his name had been entered in the register as the holder of the seven and a half shares. That circumstance is not, in my opinion, material, as the real determining factor is his knowledge that the company treated him as a shareholder and his acquiescence in being so treated, and that I take to have been the opinion of the Chief Justice of Ontario, judging from his observations in the *Cornwall* case [*Re Cornwall Furniture Co.*, 20 O.L.R. 520] which I have quoted—"Having assented to the allocation of the shares and accepted the position of holders in respect of them, they cannot be relieved. . . ."

The Act under which the company was incorporated, the Ontario Companies Act, R.S.O. 1897, ch. 191, contains no provision similar to sec. 25 of the English Companies Act of 1867, which provides that every share "shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares."

It is clear, however, from *Ooregum Gold Mining Co. of India* v. *Roper*, [1892] A.C. 125, that, apart altogether from the provisions of sec. 25, the issue of shares at a discount is *ultra vires* a company whose capital is divided into shares of a fixed amount, and the liability of the shareholders of which is limited to the amount unpaid on their shares. See the observations of the Lord Chancellor (p. 134), Lord Watson (pp. 135-6), Lord Macnaghten (p. 145), and Lord Morris (p. 148). See also *Welton* v. *Saffery*, [1897] A.C. 299, *supra*.

There is, in my opinion, no reason why these and similar cases should not be applicable to companies incorporated under the law of Ontario.

The Ontario Companies Act, R.S.O. 1897, ch. 191, requires that the number of the shares and the amount of each share shall be stated in the application for incorporation (sec. 10); and sec. 33 provides that "not less than ten per centum upon the allotted shares of stock of the company shall, by means of one or more calls formally made, be called in and made payable within one year from the incorporation of the company; the residue when and as the by-laws of the company direct;" and, although there is no express provision limiting the liability of shareholders to the amount unpaid on their shares, sec. 37, im-

pliedly at all events, so limits it; and the constitution of a company incorporated under that Act possesses, therefore, both of the features which led to the conclusion that it was *ultra vires* of a company incorporated under the English Act of 1867 to issue shares at a discount; and in the reported cases in this Province the English decisions have been applied, notwithstanding the absence of any provision in our Companies Acts similar to sec. 25 of the English Companies Act.

For these reasons, I am of opinion that the respondent was not entitled, upon the ground of mistake, to be relieved from his position of shareholder in respect of the two and half shares; and it follows, I think, that the resolution of the 14th January, 1910, and what was done under it, was *ultra vires* the company.

In the *Ooregum* case [*Ooregum Gold Mining Co.* v. *Roper*, [1892] A.C. 125, the Lord Chancellor (at p. 133) said:—

> It seems to me that the system thus (*i.e.*, by the Companies Act) created by which the shareholder's liability is to be limited by the amount unpaid upon his shares, renders it impossible for the company to depart from that requirement, and by any expedient to arrange with their shareholders that they shall not be liable for the amount unpaid on the shares, although the amount of those shares has been, in accordance with the Act of Parliament, fixed at a certain sum of money. It is manifest that if the company could do so the provision in question would operate nothing. I observe in the argument it has been sought to draw a distinction between the nominal capital and the capital which is assumed to be the real capital. I can find no authority for such a distinction. The capital is fixed and certain, and every creditor of the company is entitled to look to that capital as his security.

In *Bellerby* v. *Rowland & Marwood's Steamship Co.*, [1902] 2 Ch. 14, the Master of the Rolls, quoting this passage from the speech of the Lord Chancellor, added (p. 26): "And the opinions of the other learned Lords are to the same effect. The justification of forfeitures rests upon the statute itself, and I think that since *Trevor* v. *Whitworth* (1887), 12 App. Cas. 409, no authority can be relied on as justifying a surrender having the effect of reducing capital which cannot be supported as a form of forfeiture." Stirling, L.J., in the same case (p. 29), expressed the opinion that "the weight of authority is in favour of the view that forfeiture, which is specifically mentioned in the Act of 1862, stands on a special footing, and that surrenders can only be supported in circumstances which would justify forfeiture." Cozens-Hardy, L.J. (p. 31), dealing with the same question, says:—

> When, however, the transaction involves, as in the present case, the release by the company to the shareholder of uncalled capital on their shares it seems to me that it is within *Trevor* v. *Whitworth*, 12 A. C. 409, a reduction of capital not sanctioned by law. The decision of

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the House of Lords in the *Ooregum* case, [*Ooregum Gold Mining Co. v. Roper*, [1892] A.C. 125], that shares in a limited company cannot be issued at a discount, involves the principle, that the company cannot by any device relieve a shareholder from the liability to pay the full amount due on his shares. This would be the result, if the shares had been retained by the plaintiffs, instead of being surrendered to the company. But the fact that in consideration of the release the shares were surrendered seems to me to render the transaction no better. Uncalled capital is part of the assets of the company. . . . The company, therefore, parted with £415, a portion of its assets, in consideration of the acquisition of the shares. This was a purchase of the shares, and is directly within the authority of *Trevor* v. *Whitworth*, 12 A.C. 409.

I do not understand how half a share came to be allotted. I find no warrant in the Act to allot anything less than a share, and I do not think that the liability which, I hold, attached to the respondent, extends to the half share which the company assumed to allot to him. This point was not taken on the argument, and counsel may speak to it if the appellant contends otherwise; and, subject to this, an order will issue allowing the appeal and substituting for the order of the Local Master an order that the name of the respondent be put upon the list of contributories in respect of two shares.

There will be no costs of the appeal or of the application to the Local Master.

Since writing the foregoing, my attention has been called to a recent decision of my brother Middleton, *Re Matthew Gay Carriage and Automobile Co., Thomas's Case* (1912), 1 D.L.R. 642, 3 O.W.N. 902, which, it is said, is opposed to the view I have expressed as to the effect of the resolution to cancel the shares and the action taken upon it. I find, however, on inquiry from my learned brother, that it is not, and that in that case the contract to take shares was still executory at the time the resolution to cancel the bonus shares was passed.

Appeal allowed.

[Leave to appeal to the Court of Appeal from the above decision was granted by MIDDLETON, J., on the 27th May, 1912: see 3 O.W.N. 1326.]

BOLAND v. PHILP.

ONT.

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June 27

Ontario High Court. Trial before Kelly, J. June 27, 1912.

1. SPECIFIC PERFORMANCE (§ I A—2)—RIGHT TO REMEDY—CONTRACT FOR SALE OF LAND—ABSENCE OF INSTRUCTIONS OR AUTHORITY OF OWNER.

One cannot be compelled to specifically perform a contract for the sale of land owned by him, which was made by a person who acted without instructions from or the authority of the owner.

2. CONTRACTS (§ I E 5—97)—REQUISITES—STATUTE OF FRAUDS—SUFFICIENCY—SEVERAL WRITINGS.

Where the defendant, who had, while dealing with a real estate agent, mentioned property belonging to his wife, without giving him instructions to sell it, upon receiving an offer by telegraph for such property, which, however, was in fact made to another real estate agent, not associated with the first real estate agent, in any manner, but who had negotiated a sale with the plaintiff, and had given him a receipt for a cash payment stating that it was received to apply on the offer to purchase the property, which it described, refused such offer, and later, the second real estate agent sent a telegram in the name of the first real estate agent making another offer, which the defendant wired the first agent to accept, stating that the title was in his wife, whereupon the second agent accepted from the plaintiff a further payment by cheque, payable to the Realty Exchange, which did not shew for what it was given, and which was indorsed by the second agent in his own name under instructions from the first agent, such receipt and telegrams did not amount to a written contract sufficient to satisfy the requirements of the Statute of Frauds, since the defendant's telegram to the first agent was an instruction to him to accept the offer of the plaintiff, which he did not do, and the acceptance by the second agent was insufficient because the defendant had not given him authority to accept it for him, and the indorsement of the cheque by the second agent under the first agent's instructions, if sufficient to constitute an acceptance, was not binding upon the defendant, since the first agent could not delegate to the second agent the authority the defendant had given him.

3. COSTS (§ I—2)—DISMISSAL OF ACTION—PLAINTIFF MISLED BY DEFENDANT'S CONDUCT.

Upon the dismissal of an action for damages for the breach of an agreement to sell land, upon the ground that those who purported to act for the defendant had no authority to make such contract, costs will not be awarded against the plaintiff, who was misled by the defendant's conduct into the belief that he was dealing with a person who had the right to contract with him.

Statement

ACTION against William H. Philp and Ida Emily Philp, husband and wife, for specific performance of an alleged agreement for the sale of property on Murray street, in West Toronto, or, in the alternative, for damages for breach of the agreement.

The action was dismissed without costs.

A. C. Macdonell, K.C., for the plaintiff.

G. H. Gray, for the defendants.

Kelly, J.

KELLY, J.:—The defendant Ida Emily Philp is the owner of the property; the evidence shews that any negotiations or dealings with the plaintiff in respect of it were carried on, not

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by her, but by others without any instructions or authority from her. She is not, therefore, liable.

As to the defendant William H. Philp, he had had dealings with an agent, Bergland, in relation to other property, and mention was made between them of the property now in question, although it is not clear that any instructions were given to Bergland to sell it.

On the 14th September, 1911, the defendant W. H. Philp being then in Saskatoon, a telegram was sent to him by Bergland, that he had an offer for the purchase of the property, the offer referred to being a verbal one by the plaintiff, who made it to one Findlay, to whom he then paid $20 and from whom he took a receipt therefor, "as deposit on offer to purchase lots 36, 37, 38, 39, Murray street."

Findlay was not associated with Bergland; but, having learned from the plaintiff that he was desirous of investing in the purchase of real estate, and knowing of the property in question, he negotiated to bring about a purchase thereof by the plaintiff; and, after Findlay had communicated with Bergland, the three of them went to examine the property or what they believed was this property. It was after this examination that the plaintiff made the verbal offer and paid the $20.

The defendant W. H. Philp, on the 15th September, replied by telegram to Bergland refusing the offer, but mentioning terms which he would be willing to accept.

The plaintiff, on or about the 15th September, became aware, through searching the registry office, that the defendant Ida Emily Philp, and not William H. Philp, was the owner of the property.

On the 20th September, this telegram was sent by Bergland to W. H. Philp, at Saskatoon: "Have another offer your two hundred feet Murray street at seventeen fifty a foot. Three hundred cash. Two hundred and fifty every six months and entire balance in three years. Interest six per cent. Very responsible party who is financially good. Advise you to accept this offer. Answer immediately."

Both telegrams to Philp were written out by Findlay, who signed Bergland's name thereto. Bergland denies that he was aware that the telegram of the 20th September contained any reference to the responsibility and financial standing of the person making the offer, or that it advised the acceptance; but he admits that he approved of the other terms of the telegrams and of Findlay's signing his name thereto.

On the 21st September, Philp replied to Bergland by the following telegram: "Accept offer. Property in wife's name. Back in two weeks." A formal contract was then prepared between the plaintiff and Ida Emily Philp, and was signed by the

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plaintiff; but, on its being presented to Mrs. Philp for her signature, she refused to sign it, and denied any right or authority in her husband or Bergland or any other person to offer the property for sale.

The plaintiff then fell back on the telegram and receipts as constituting an agreement, for breach of which he claims damages as against the defendant W. H. Philp.

After Bergland's receipt of the last-recited telegram, Findlay communicated with the plaintiff, who paid Findlay another $80 by cheque payable to the Realty Exchange, the cheque not indicating in any way the purpose for which it was given. It was endorsed by "The Realty Exchange, W. H. Findlay;" Findlay received the proceeds thereof, which, at the time of the trial, were still in his possession.

I do not think the plaintiff can succeed in his contention that Philp's telegram of the 21st September and the endorsement by Findlay of the $80 cheque (or indeed, all the telegrams and receipts taken together) constitute a memorandum of an agreement sufficient to satisfy the Statute of Frauds. Philp's telegram of the 21st September to Bergland was simply an instruction to accept the offer. Bergland did not act on it by giving any acceptance. Whatever authority was given by Philp was to Bergland only; and, even if Findlay took the $80 cheque and signed the endorsement thereof under instructions from Bergland, and even if that act could be held to constitute an acceptance by Findlay of the plaintiff's offer, the plaintiff's case is not made out, for Bergland had no power to delegate the authority given to him.

On the whole evidence, the plaintiff's action must be dismissed; but, as the course pursued by W. H. Philp tended to mislead the plaintiff into the belief that he was dealing with those who had a right to contract with him, and for other reasons appearing upon the evidence, the dismissal will be without costs.

Action dismissed without costs.

Ex parte YOUNG.

SASK.

S. C. 1912

July 15.

Saskatchewan Supreme Court, Wetmore, Newlands, Johnstone and Lamont, JJ. July 15, 1912.

1. MUNICIPAL CORPORATIONS (§ II F 2—176)—POWER OF CITY TO CONSTRUCT WATERWORKS—ACQUISITION OF LAND—R.S.S. 1909, CH. 91.

A city has power under the Municipal Public Works Act, 1909, ch. 91, R.S.S., to construct waterworks and to acquire necessary land therefor either within a city or in the neighbourhood thereof.

2. EMINENT DOMAIN (§ I D 3—66)—RIGHT TO TAKE PROPERTY FOR WATERWORKS—SASK. CITY ACT.

Expropriation proceedings to acquire land for a city waterworks system must be based upon the Sask. City Act.

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3. EMINENT DOMAIN (§ I C—21)—WHAT PROPERTY MAY BE TAKEN—LAND COVERED WITH WATER—N.W. IRRIGATION ACT, 1898.

Land covered with water may be expropriated by a city for a waterworks system under the provisions of the Sask. City Act, where the land was granted by the Crown, without reservation except the right of navigation and fisheries, before the passage of the North-West Irrigation Act, 1898.

4. EMINENT DOMAIN (§ II A—80)—PROCEDURE — EXPROPRIATION OF CROWN LANDS—DOMINION STATUTE.

Land covered with water, which was granted by the Crown after the passage of the Irrigation Act, 1898, can be expropriated by a city for waterworks purposes, only under the provisions of such Act.

Statement

HEARING of a reference to the Court *en banc* of questions arising on a motion for prohibition to a district Judge.

H. Y. MacDonald, for Vincent A. Young.

W. B. Willoughby, for the city of Moose Jaw.

The judgment of the Court was delivered by

Newlands, J.

NEWLANDS, J.:—The city of Moose Jaw commenced expropriation proceedings against the above-named Vincent A. Young to enable them to take certain lands of his, being part of section 28, township 17, range 29, west of the second meridian, for the use of the waterworks system of that city. After these proceedings were commenced, Young applied to the Chief Justice for a writ of prohibition to prohibit the Judge of the District Court of Moose Jaw from proceeding with the arbitration in connection with such expropriation proceedings under the City Act.

By consent of the parties the following questions were referred to this Court by the Chief Justice:—

(1) Has the city, under the City Act and the Municipal Public Works Act (Revised Statutes of Saskatchewan, chapter 91) or either of them or taking them together, authority to install or extend a system of waterworks for the use of the city?

(2) In view of the provisions of section 21 of the Saskatchewan Act (4 and 5 Edw. VII. ch. 42 of the Dominion of Canada) and of the Irrigation Act (chapter 61 of the Revised Statutes of Canada), has the city authority to install or extend a system of waterworks for the use of the city, or to acquire or expropriate land with a view to the same, without first obtaining the authorization of the Minister of the Interior?

(3) Under which Act should the expropriation proceedings be taken and carried on?

(4) Could the land be expropriated under the City Act for the purpose of the waterworks, and the water be acquired under the Irrigation Act?

(5) Was it the duty of the applicant to satisfy me that he did not hold the land under section 8 of the Irrigation Act? and if so, has he satisfied the onus cast upon him?

(6) If the power to acquire land for the purpose of installing or extending a system of waterworks is given by the Municipal Public Works Act or by the Irrigation Act, and not by the City Act, has Judge Ouseley authority to act as arbitrator?

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The Municipal Public Works Act gives to the city the necessary powers to construct waterworks both in the city and in the neighbourhood thereof, and to enter upon and acquire any lands for such purposes: ch. 91, R.S.S., secs. 2 to 5. By section 30 of this Act the corporation is required to make reasonable and adequate satisfaction to the owners, occupiers, or other persons interested in the land, water, rights or privileges entered upon, taken or used by the corporation or injuriously affected by the exercise of its powers, and in case of disagreement the compensation or damages shall be ascertained as provided in like cases in the municipal law in force in respect of the particular municipality concerned, in this case the City Act, which by section 244 and the following sections, provides for arbitration where the city desires to acquire land and cannot arrive at a fair price with the owners, the District Court Judge for the district in which the municipality and land are situate being the arbitrator in such case.

Young has a certificate of title for the whole of section 28.

The grants from the Crown for the north-east and south-west quarters contain no reservation of the waters in these quarter sections excepting navigable waters and fishing rights, with neither of which have we any concern at the present time. All other waters upon these two quarters were granted by the Crown and are the property of Young, and are not affected by the Irrigation Act, the grants being dated on the 30th and 31st December, 1897, respectively, and being prior to that Act, 1898, and there being nothing in the Act which would take from the applicant anything the property in which had passed to him before the date of its passing. Section 9 of that Act, which was referred to on the argument, only refers to water rights which have been acquired as such, and not to waters which have been granted as part of the land. Therefore, as far as these two quarter sections are concerned, both land and water are the property of Young.

Although the city of Moose Jaw may, by the proceedings they have instituted, expropriate any lands, including lands covered with water the property of Vincent A. Young, required for their waterworks, they cannot by these proceedings expropriate any water or the land forming the bed or shore thereof on the south-east or north-west quarters of the said section 28, because the grants from the Crown to the said Vincent A. Young for the south-east quarter and the grant to Margaret Young for the north-west quarter of said section 28 are subsequent in date to the Irrigation Act and contain the following provision:—

> Provided, and in pursuance with section 5 of the North-West Irrigation Act it is hereby declared, that these presents shall not vest in the said Vincent Albert Young, his heirs and assigns, any exclusive

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right with respect to any lake, river, stream, or other body of water, or in or with respect to the water contained or flowing therein, or the land forming the bed or shore thereof.

And I need not say that in proceedings against Young they cannot expropriate what does not belong to him.

In order to get water rights in the north-west and south-east quarters of this section they will have to proceed under the Irrigation Act.

As to the effect of that Act upon the Saskatchewan Act, sec. 21 (4 and 5 Edw. VII. ch. 42) provides that:—

> All Crown lands, mines and minerals, and royalties incident thereto, and the interest of the Crown in the waters within the province under the North-west Irrigation Act, 1898, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada.

thus retaining the same title in the waters as they do in the lands, but in no wise affecting the rights of the province in any other particular. To get either land or water belonging to the Dominion of Canada, the city of Moose Jaw must proceed under the Dominion statutes, but all other rights can be acquired by them only under the City Act (Sask.).

I think there is no necessity for me to answer the above questions otherwise than I have done.

Judgment accordingly.

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June 6.

REX v. CUMMINGS.

Quebec Court of King's Bench (Crown side), Gervais, J. June 6, 1912.

1. EVIDENCE (§ XII L—986)—CRIMINAL CASES—SUFFICIENCY AND WEIGHT OF A CONFESSION.

A Court should weigh all the circumstances which precede and surround a confession, in order that it may decide as to its accuracy, the observation of the rules in such cases provided, and its validity or invalidity.

[*R.* v. *Day*, 20 O.R. 209; *R.* v. *Elliott*, 3 Can. Crim. Cas. 95, and *R.* v. *Viau*, 7 Que. Q.B. 362, specially referred to.]

2. EVIDENCE (§ VIII—674)—ADMISSIBILITY OF CONFESSION—STATEMENT MADE TO CHIEF DETECTIVE AFTER WARNING.

A confession made in the office of the chief detective of the city, in his presence, and that of his assistant and one or two newspaper men who happened to be there, without pressure upon the accused, or threats or promises of immunity, but upon his own initiative and after he had been warned by the chief detective in the following words: "Now I am going to ask you a few questions. Make a statement if you want to; but I am going to tell you that you are not obliged to make one, but if you do, it will be taken down and may be used in connection with your trial," is admissible in evidence on the trial of the accused.

3. EVIDENCE (§ VIII—670)—DISTINCTION BETWEEN CONFESSION MADE TO PERSON IN AUTHORITY AND THAT MADE TO OTHERS.

A distinction is to be drawn between a solemn confession made before a justice of the peace or before any person having such authority over the accused as will bring the latter to believe that any promises made to him will be observed, and a confession made at any other time and under different circumstances.

ARGUMENT of an objection raised for the prisoner on a trial for murder as to the admissibility of a written confession made to a detective (S. H. Carpenter) by the accused, and signed by the accused in the presence of the witness, on November 22, 1911, at the police detective headquarters in Montreal.

J. C. Walsh, K.C., for the Crown.

Gregor Barclay and *A. P. Mathieu*, for the prisoner.

GERVAIS, J.:—Objection has been taken by counsel for the accused upon several grounds of invalidity, in so far as its admission in evidence is concerned, affecting the confession made by the accused in the presence of the witness Silas H. Carpenter, at detective headquarters, at Montreal, the 22nd of November, 1911, at 5.30 o'clock in the afternoon, respecting the murder of the wife of the accused which occurred the previous evening. Gervais, J.

Counsel for the accused have alleged, in support of their objection, the following grounds:—

(*a*) Promise or assurance by the witness that such confession would be an advantage and help to the accused;

(*b*) Impression of fear in the accused, following upon his arrest and his confinement in the cells immediately prior to his confession;

(*c*) Frequent visits paid by the witness to the accused in the latter's cell shortly before the confession was made;

(*d*) The needless but terrifying setting of a judicial investigation to receive such confession;

(*e*) Pressure, encouragement and incentive, equivalent to constraint and loss of freedom of will, practised by the witness upon the accused.

The Crown before attempting to produce in evidence the confession (filed as paper No. one in the record) established that such confession was freely and voluntarily made and was offered by the accused after he had been advised by the witness not to speak at that time, and after being warned by the witness to remember that whatever he might say would be taken down in writing and would be used against him at his trial.

During the cross-examination of the witness no proof was developed establishing any inaccuracy or invalidity in the confession.

The evidence of the witness shews that the confession was made freely and that no single one of the grounds of objection to the accuracy and validity of the confession has been sustained.

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The evidence of the witness is conclusive that the confession was made without pressure being brought to bear upon the accused, and that there was absence of all the other unjust and illegal methods and conditions relied upon by counsel for the prisoner; that the confession was made upon the prisoner's own initiative, after the witness had refused to listen to him earlier in the day; that the confession was made about 5 o'clock in the afternoon in the presence only of the witness,—his assistant, Mr. Burns, and one or two newspaper men happening to be present at the time—in the office of the witness, chief detective of Montreal, and after the accused had been warned, according to the statement made by the witness, in the following words:—

> Now, Cummings, I am going to ask you a few questions. Make a statement if you want to; but I am going to tell you that you are not obliged to make one. But if you do, it will be taken down in writing and may be used in connection with your trial.

The inimical use indicated by the words "against him," which might be made of his confession, clearly results from the whole tenor of the expressions employed by the witness to warn the accused. This conclusion is the more strengthened by the inference that the confession might be used in the criminal proceedings then about to be pursued against the accused, that is, proceedings necessarily adverse to the prisoner inasmuch as the sole object thereof was to have him punished.

In the present instance, the confession made by the accused was not drawn nor exacted from him nor provoked by threats, nor by promise of immunity, nor was he encouraged or pressed to make it. Hence, the confession was freely and voluntarily made by the accused after he had been warned not to make it as it might be used against him to his prejudice. More than that, proof of any irregularities has not been established, but, on the contrary, evidence in the other sense remains unshaken.

To secure a voluntary and free confession it is not necessary that the arrest, detention and judicial observances and the presence of officers of the law should be wanting to secure the existence of the essential conditions of a lawful confession.

A distinction is to be drawn between a solemn confession made before a justice of the peace or before any person having such authority over the accused as will bring the latter to believe that any promises made to him will be observed, and a confession made at any other time and under different circumstances. This is the doctrine, far from being settled, laid down in decisions in England and in this country respecting the admissibility in evidence of confessions made by accused persons.

From the witness's demeanour and from his evidence there is no ground for suspecting that the confession was not freely and voluntarily made, that it is to say, was invalid, on the part

of the accused, or that such confession was defective for want of form or validity, as has been contended by counsel for the accused.

In any event, the confession but confirms the other evidence of the immediate participation of the accused in the crime with which he is charged by the Crown.

A Court should weigh all the circumstances which precede and surround a confession in order that it may decide as to its accuracy, the observance of the rules in such cases provided, its validity or its invalidity: *Rex* v. *Day* (1890), Boyd, C., 20 O.R. 209; *Rex* v. *Elliott* (1899), Armour, C.J., 3 Can. Cr. Cas. 95; *Rex* v. *Viau*, 7 Que. K.B. 362.

Reference is also made to secs. 684 and 695 of the Criminal Code.

The objection is rejected; the admissibility in evidence of the confession is allowed and permission is granted to read it to the jury.

Objection overruled.

WARREN v. VILLAGE OF MALBAIE.

Quebec Court of Review, Lemieux, A.C.J., Cannon, and Dorion, JJ. January 30, 1912.

1. WATERS (§ III B 2—185)—WATER SUPPLY—LIABILITY OF MUNICIPAL CORPORATION TO SUPPLIES OF WATER FOR BREAK IN PIPE.

Where a municipal corporation is the owner of a water system connected with other systems, whose owner has agreed to supply the municipal system with the necessary water, the corporation is not responsible for damages resulting from a break in its system, which diminishes the pressure in the remaining systems, when it has used reasonable diligence to find and repair the break.

2. WATERS (§ III B 2—185)—RIGHTS OF PRIVATE WATER COMPANY AGAINST MUNICIPAL CORPORATION FOR DAMAGES—RECOVERY FOR ADDITIONAL WATER.

Where the owner of a private waterworks system under a contract to furnish water to the municipal system, controls the supply of water and during the time of a break voluntarily furnishes more water to the municipal system than he is required to do under his contract, and the supply and pressure of water in his own system is diminished in consequence, he cannot recover from the corporation the damages he has suffered thereby, nor can he recover the value of the additional water so furnished.

Statement

THE judgment inscribed for review, and which is confirmed, was rendered by the Superior Court, Letellier, J., on July 27th, 1911.

P. D'Auteuil, K.C., for the plaintiffs.

Emile Gagnon, for the defendants.

Quebec, January 30, 1912. The judgment below was affirmed by the Court of Review, Dorion, J., dissenting.

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LEMIEUX, A.C.J.

LEMIEUX, A.C.J. (translated):—This action, which was dismissed by the Superior Court, is for recovery of damages caused to the plaintiffs by the breaking of a water main belonging to the corporation, defendant.

A brief recital of the facts of the case will shew the nature of the contestation and the respective contentions of the parties.

The Warrens, plaintiffs, were owners of a waterworks system which was supplied from a single spring by means of one intake but was divided into three branches, one serving the village of Malbaie, another the village of Pointe-au-Pic, and the third the parish of Malbaie.

On December 26, 1906, the Warrens sold with warranty to the corporation of the village of Malbaie one of the systems of the waterworks, namely, the one extending through the village of Malbaie from the place called the Cross Roads. By the deed of sale the Warrens engaged to furnish and supply with water all that part of the water system purchased by the village.

The portion of the water system that was sold worked well until the 7th February, 1907, when the defendant noticed a weakness in the water pressure in its system and the diminution of the pressure gradually became much worse with the result that from this time up till the 18th March, on the one hand the defendant was almost entirely deprived of water and on the other hand the plaintiff's water pipes froze through their not having sufficient water, their customers suffering from lack of water refused to pay their rates and the plaintiffs were unable to fill a contract with the Government to furnish water to one of its boats.

Immediately the loss or failure of pressure was noticed the Warrens and the corporation began to look for the cause of it.

We may say first, that the water system of the corporation was under the control of a committee of the municipal council composed of several of its members and assisted by a plumber named Couture, who had, it appears, twelve years' experience in regard to waterworks.

The cause of the diminution of water puzzled all the interested parties. At the outset some of them, the Warrens, attributed it to the breakage of a pipe in one of the systems; others, the corporation and its employees, to the weakness of the spring.

In this respect the corporation was mistaken for the spring was sufficient to supply the water system as was shewn by the results before and after the accident. The abnormal and extraordinary fluctuation in the water pressure was due to the breaking in the pipe. The problem to be settled was when and where this break had occurred. The solution of the difficulty was not easy as the plaintiffs admit, both in their evidence and also by the fact that they declared themselves unable to find the trouble after having made an active and lengthy search.

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The search was made and prosecuted jointly by the Warrens and by the council and its officers. It consisted in closing the valves at the point of intersection of the three systems, in digging holes and trenches in the village of Malbaie to find if there was a leakage of water which would indicate a break in the pipe, in examining the outlets and intake by closing the valves distributed at different points throughout the system and examining also the waterworks system at the Cross Roads and upon the beach and in enquiring among the ratepayers whether they had not noticed flooding or loss of water in their cellars or elsewhere.

The Warrens, after having exhausted all methods of search which their practice and experience in waterworks had suggested, gave up on the 18th February, stating that it was impossible for them to discover the source of trouble.

The corporation and its officers went on with the search and followed up and examined the system in every direction and throughout its whole length. In the end they found with the assistance of Councillor Brassard, the place where the pipe was broken. It was fifteen feet from the Angers Bridge in the direction of the wharf and at three hundred feet from the point of intersection of the water systems, in a hollow where a pipe passed six or eight feet under ground and was covered by twelve feet of snow.

What had rendered the discovery of the break so difficult is that generally when a pipe is broken the water spreads over the surface of the ground in great quantities and as a result causes the discovery of the trouble, whereas in the present case, the water, on account of the quantity of earth and snow covering the pipe, did not come to the surface and left no trace as it followed the slope of the ground.

Léofred, the Warrens' engineer, confesses that in such cases it is difficult to make a search and that it is necessary to grope about. The trouble, he says, is sometimes discovered in a few hours and sometimes it may take a fortnight.

They knew that the defect was in the water system of the village for when the valve of this part of the waterworks was closed there was abundant water in the two systems of the parish and Pointe-au-Pic, but when it was opened a great loss of water was noticed immediately, which can easily be understood for all the water escaped by the hole in the broken pipe.

Although it was evident that the trouble was in the village, the plaintiffs themselves who had had a fairly large experience of the same waterworks as they had carried them on for several years were entirely mistaken when they wished to locate the break. They affirmed persistently enough to throw the defen-

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dants off the track that the breakage had occurred or had existed at such and such a place when events had shewn the contrary, since it was proved that the break took place at a distance of twenty arpents from the places indicated by the Warrens.

The plaintiffs' mistake is of a kind to excuse the defendants if it did make any mistake especially when we consider that the parties at the outset, actuated by common interest, made joint searches, mutually advised and consulted each other and suggested plans and means for finding the break.

Under the circumstances we conclude like the first Judge that the defendants did all they could do to remedy the inconvenience and lessen the damage resulting from this breakage of the water pipes.

Engineer Guay has testified that the corporation did more than is usually done in such a case to find the defect.

In the present case as often happens, after the break in the pipe was found some who were prophets after the event are ready to say that it was easy to find the trouble. But assisted by the opinion of experts we conclude that the matter was not so easy.

It is said that the corporation did not have on hand certain instruments, a manometer, a gauge, which would have helped them to make the discovery sooner. This is true, but the plaintiffs who were owners of part of the water system supplied from the same spring and obliged to furnish water to the water pipes in the village and were consequently in a common position with the corporation, do not appear to have had such appliances themselves; at least they did not make use of them, and consequently they are in a poor position to reproach the corporation. The plaintiffs sold the water system to the corporation who administered it as they used to do and as the thing is generally done in the country. If these instruments were useful and the Warrens had them, why did they not make use of them?

It is said that the corporation is not responsible because it is a case of a fortuitous and unforeseen event, that is to say, an event which, in the eyes of and for him who suffers, has no other cause than the inscrutable decrees of Providence.

It is undeniable that the breakage of a water pipe, especially in our country and with our climate, constitutes a fortuitous event or a case of *force majeure*, but there is a distinction to be made: it is possible for a water main to break or for a pipe to break but what is unforeseeable is the time when and place where such a breakage takes place. The corporation is not sued in damages for the fact of the breakage itself but it is sued because it neglected to repair this break within a reasonable delay and this negligence or delay caused damages to the plaintiffs. A party would not be responsible for a fortuitous event hap-

pening which only resulted from Providence such as lightning, rain, etc.; if lightning struck down a building the owner would not be responsible for damages resulting therefrom to a third party but he would be responsible for the damages resulting from his negligence to repair the building which was struck by lightning and which fell down after a certain time.

If the defendant corporation had not proved that they had done everything that was possible to do under the circumstances to repair or prevent the consequences of the fortuitous event, that is to say, the break in the water pipe, the plaintiffs would have been well-founded in their recourse. But this recourse is not upheld because the defendants have sufficiently shewn their diligence in repairing the consequences of the fortuitous event and because they have, moreover, shewn that the pipe which was broken was of bad quality although the plaintiffs by their deed of sale guaranteed the water system against all troubles in law, that is to say, against hidden defects. The pipe which was buried eight feet under ground had a hidden defect because the defect in it was invisible and could not be ascertained.

But there are other grounds on which we rest our conclusions.

At the beginning of the search it was specially agreed between Couturier, the mayor of the village, and the Warrens that the latter would make all possible search and that if the break was found in the village the corporation would pay the cost.

It was after this understanding that the Warrens made enquiries and searches during twelve days without success and then gave them up owing to the impossibility of their finding the defect. They gave up their search on the 20th, when, according to their own admission, all the damages were incurred and they did this without reserve and without declaring their recourse against the municipality. It was only on the 22nd March after the pipe was repaired and when the water was again flowing abundantly that the Warrens served a protest for damages upon the corporation and it was only on the 20th January, 1908, that is to say, ten months later, that they instituted the action.

If the Warrens were unable to find the cause of the loss of water, notwithstanding their great interest in doing so, how can they reasonably reproach the corporation for not having succeeded better than they did?

But a peremptory reason which forces us to maintain the judgment and dismiss the action is that immediately after the breakage of the pipe, namely, on the 8th February, the plaintiffs were masters, so to speak, of all the water in the aqueduct. In fact they controlled absolutely the valve of the water system

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of the village. A man had been appointed by them for this purpose in order to prevent the representatives of the village from having access to it or from touching it. This valve when it was shut had the result of furnishing all the water necessary for the Warrens systems; it was sufficient therefore to close this valve and the Warrens would at once have all the water they required. The Warrens, therefore, could have served their customers with water and if the system froze at a certain time so that water could not be furnished to the Government's boat, the fact is not attributable to the lack of water but to climatic causes for which the corporation is not responsible. In other words the Warrens were not obliged to furnish the village with more than the portion of water to which it was entitled, and if by giving it more they suffered damages, they cannot complain because the damage was voluntary and foreseen, *volenti non fit injuria*.

There is a *considérant* in the judgment of the Court of first instance to the effect that the water pipe which was sold with warranty by the Warrens to the defendant was defective in quality. It is in evidence that this pipe was of inferior quality; the pipe should not have served as a water main and it must have broken simply under the pressure of the water which was furnished by the plaintiffs.

The first Court decided that the action was prescribed inasmuch as it was taken six months after the accident. It rested on section 8 of 5 Edw. VII. ch. 50, a statute entitled "An Act to increase the powers of the Corporation of the Village of Malbaie."

This section is to the following effect: If any person alleges or claims to be injured by any accident or casualty for which he intends to claim damages or compensation from the village he shall after notice bring his action within six months.

We do not adopt the view of the first Court on this point because the prescription laid down by the section cited applies to any recourse resulting from a simple delict.

The actual recourse is rather the result of a contractual delict, that is to say, a delict which the corporation committed towards the Warrens who were in a common position with themselves by delaying to repair the pipe as they were obliged to repair it under the contract of sale for the waterworks by the Warrens to themselves.

The judgment is confirmed with costs but in its effect (*dispositif*) only.

Cannon, J.

CANNON, J.:—There is a difference of opinion as regards one item of the damages, namely, those claimed for the loss of water escaping from the broken pipe. It is these damages which are the subject of amendment to the declaration.

My learned colleague, Judge Dorion, is of the opinion that the plaintiffs have a right to damages under this head because there was negligence and want of care on the part of the defendants in discovering and stopping the loss of water.

As I do not concur in this view I ought, out of deference to my colleague, and for the information of the parties, to give my reasons for arriving at a different conclusion on this point.

The deed of sale between the parties determines in the following terms the plaintiffs' obligation to furnish water to the water pipes sold to the defendants: "The parties of the first part promise and oblige themselves to furnish always . . . the necessary water to supply the said actual water system in a sufficient and proper manner."

On February 7th, 1907, a considerable diminution of water was noticed in the defendants' water system. They immediately warned the plaintiffs of it, the latter and the defendants' employees made a search to find the leak but without success until about the 18th February on which date the plaintiffs discontinued their search.

During this period the plaintiffs could not accuse the defendants of negligence or want of care since they themselves made a search and could not discover the trouble.

The plaintiffs were the masters of and had control of the valve which separated the defendants' water system from the plaintiffs' and at this date they themselves regulated the quantity of water which they could and ought to furnish to the defendants. They put a man named Charles Grenier in charge of this valve and made him shut it every day from two till four o'clock in the afternoon so as to be able to furnish water to their customers at Pointe-au-Pic.

This was done from the 20th February until the defendants discovered and replaced the broken pipe about the 18th March, as admitted by Edward Warren, one of the plaintiffs, who was examined as witness.

The plaintiffs therefore during this period fulfilled their obligations to furnish water to the defendants' aqueduct in the way which they deemed proper in order to give water to their customers at Pointe-au-Pic and to the defendants.

The plaintiffs, having thus determined themselves the quantity of water which they would keep for their customers at Pointe-au-Pic and that which they would furnish to the defendants, cannot claim damages from the defendants for wasting the water which they themselves supplied after having given their customers at Pointe-au-Pic a supply of water which they considered reasonable under the circumstances. They themselves fixed the defendants' rights and they extended their obligations towards them. There is, therefore, no negligence or want of care on the defendants' part under this head.

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As to the rest of the case I agree with the opinion of the learned Acting Chief Justice and I consider that the judgment in the first instance should be confirmed as to its effect.

DORION, J. (dissenting):—This is a case of an aqueduct fed from a common source; near the point of division there is a valve which allows the distribution of water to be controlled.

The plaintiffs bring suit because the defendants left their water pipes without repairing them for a month and a half, thereby causing damage to the plaintiffs' water system which froze by reason of the loss of water and the lack of circulation; they claim for temporary works, thawing, repairs, loss of customers, etc., as well as for works done to assist the defendants and, by amendment, for the value of the water lost.

The defendants reply (1) under the statute 5 Edw. VII. ch. 50, sec. 8, lack of notice and prescription where a person is injured by an accident or casualty; (2) the plaintiffs are warrantors against hidden defects, being the vendors and the breakage of the pipe is due to its bad quality; (3) it was impossible to find the defect more quickly and we made every possible search from the 7th February to the 17th March, 1907; (4) you yourselves could not find it as you looked for eight days and you abandoned the search.

(1). Lack of notice; the statute only refers to claims for damages caused by accident or casualty which can only mean delict or quasi-delict; if not, it would be necessary to say that they are responsible for damages caused by lightning. Moreover, it is not an accident that is complained of, it is the failure to repair which is an obligation resulting from the contract and from the state of community and the necessary and undivided interest created by the contract.

(2). It is shewn that the pipe which broke is not of good quality but it had lasted for some ten years and it is not certain that it broke because of its bad quality; the break may have been due to the space which formed below the pipe which is a thing that is impossible to see or prevent. But, in any case, if there was a hidden defect the plaintiffs were ignorant of it and they are not responsible in damages (article 1528 C.C.). The defendants' only recourse was a redhibitory action or an action *quanto minoris*. But they have exercised neither one nor other of these remedies. There cannot, therefore, be any question of warranty against hidden defects.

(3) Could the defendants have discovered the break sooner? There can be no doubt as to that. Imagine what would happen at Quebec if a water main "was broken and they told the citizens for a month and a half, we cannot find the place where the break is," and contented themselves with asking people in Charlesbourg and Lorette, "have you seen the break"? The water

either comes to the surface or it flows away by a lower outlet if there is one, as for example, cellars, ravines, or sewers. They learned through the valves that the break was in the village of Malbaie from the 8th February; they dug three holes at random, then they visited the mouths of the sewers but they saw nothing and then they asked passers-by if they knew where the fault was. There were two ravines that the aqueduct crossed; the water could escape there under the snow without being seen above. By digging in the snow they would have seen the water but they did nothing until a commercial traveller who was smoking his pipe one day said, "If you go and look at the Angers bridge it is there." One of the councillors takes a shovel and digs five or ten minutes and there it is.

(4) Why have not you, the plaintiffs, found the spot? You ought to know your own aqueduct better than we do. You dug elsewhere and you have led us into error by saying it was elsewhere. First of all the Warrens were not obliged to know when a water main breaks the point at which it breaks; then they were not bound to repair or look for the place; finally they gave their opinion and were mistaken, they were no cleverer than the others but they were not obliged to be clever on behalf of the others and they cannot be reproached on this ground.

They did not undertake to find the break, they said, "We will look for it; if the break is within your limits you will pay." They did not find the break but it was none the less in the village of Malbaie and their search served to circumscribe the search.

But there are other facts to consider in this case. The plaintiffs undertook to furnish the defendants' aqueduct with a quantity of water sufficient for the needs of the village but not to have it lost to their own detriment. The first few days after the accident the water was insufficient to supply the houses on the wharf at the end of the plaintiffs' system near the wharf where there is a hill to overcome, and the pipe froze and could only be thawed in the spring.

The plaintiffs then, in order to satisfy their customers who were served by the portion of the pipe which had not been frozen, had recourse to the valve at the point of division; they shut it every day from two till four o'clock in the afternoon, notwithstanding the protests of the defendants who claimed water all the time. This went on for good or bad up till the 17th March. The plaintiffs suffered all the time from a partial lack of water. They might have worked the valve so as to have always kept in their system the amount of water which they had a right to have, leaving the remainder to flow into the defendants' system and to be lost at the defendants' pleasure. They would thus have fulfilled their contract literally but they would have made the village of Malbaie, whose portion of the water would

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have been lost by the break, go hungry (or thirsty). Moreover, the defendants protested against the use the plaintiffs made of the valve to keep back the water for two hours a day.

The plaintiffs therefore are not entitled to the damages which they claim and which consist principally in the expense and loss occasioned by the fact that a part of their aqueduct froze. Once more, they were only obliged to keep for themselves what water was necessary; the distribution of the water belonged to them. And even by placing themselves in the position they took and in admitting that the defendants would be responsible for the loss of water, they admitted that the damage was caused during the first eight days from the fact that the water froze in a part of their aqueduct. Now, they can hardly pretend that the plaintiffs should have found the break in the first eight days; they themselves tried to find it and failed. And their expert witness Léofred, the engineer, says that the break might have been found in a fortnight (it is true that he says later that it might have been found in twenty-four hours but his first evidence is corroborated by the defendants' witness, engineer Guay). But of the plaintiffs' claim there remains this: (1) They claim the cost of the search which they made to find the break—work which was useful in this sense that it served to circumscribe the search—work done with the defendants' consent; (2) they paid a man to work the valve for a month and a half and were occupied and put to trouble for the defendants' benefit throughout this time; (3) they furnished to their own detriment more water than they were obliged to furnish; although they furnished it voluntarily that does not prevent them claiming the value of the service rendered because they deprived themselves of it for the purpose; for instance, they were prevented from selling the ice which they were accustomed to harvest in their reservoir owing to the lack of water and in a general way they have suffered. Nobody is supposed to give his property gratuitously. The maxim *volenti non fit injuria* has no application here. It only applies in cases where compensation is claimed for a loss which one has inflicted on oneself with profit to nobody as when a workman is injured by his own fault he has no recourse against his employer. But when a person renders a service voluntarily he is entitled to the value of the service rendered unless he has shewn or unless it can be presumed that he wished to render it gratuitously. He has an action "*In rem verso.*" I am, therefore, of the opinion, to allow the plaintiffs that part of their claim which comprises the expense incurred in assisting the defendants to the value of the water furnished to the latter.

But it is useless to seek to establish the amount to which they are entitled since my opinion does not prevail.

Appeal dismissed.

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Quebec Court of King's Bench, Archambeault, C.J., Trenholme, Lavergne, Cross and Carroll, JJ. June 15, 1912.

1. APPEAL (§ III G—101)—SECURITY ON APPEALS—IMPERATIVE CONSTRUCTION—ART. 1214 C.P. (QUEBEC).

Art. 1214 C.P. (Que.) is imperative in declaring that unless an appellant declare in writing in the office of the Court whose judgment is appealed from, that he does not object to the judgment rendered against him being executed, or unless he file a copy of any judgment ordering provisional execution of the judgment appealed from, in which cases he is only bound for the payment of the costs, he "must give good and sufficient security that he will effectually prosecute the appeal, that he will satisfy the condemnation and pay all costs and damages adjudged if the judgment appealed from is confirmed" and, therefore, the Court has no discretion in the matter and the security must be furnished absolutely according to the statute.

2. APPEAL (§ III G—102)—SUFFICIENCY OF SECURITY—COSTS ONLY—C.P. QUEBEC, ART. 1214.

Security for costs only, is not sufficient on an appeal from an order condemning one to render an account within thirty days, or on default, to pay a sum of money received on account of the plaintiff, since the security must, under art. 1214 C.P., be for an amount sufficient to pay all costs, interest, and damages that can be taxed on confirmation of the judgment.

[*The Montreal, Rutland and Boston R. Co.* v. *Hatton*, M.L.R. 1 Q.B. 72; *Moore* v. *Lamoureux*, Que. 5 Q.B. 532; *Brunet* v. *The United Shoe Machinery Co. of Canada*, 12 Que. P.R. 207, followed; *O'Leary* v. *Francis*, Que. 12 S.C. 243; *Rochette* v. *Ouellet*, 9 Q.L.R. 361; *Rochette* v. *Ouellet*, 6 L.N. 412, distinguished.]

3. APPEAL (§ III G—104)—AMOUNT OF SECURITY ON APPEAL—COSTS, INTEREST AND DAMAGES.

On an appeal from an order condemning one to render an account within thirty days, or on default to pay $42,913.20, security need not be given for the payment of such sum, but only for the payment of such costs, interest, and damages as may be taxed upon a confirmation of the judgment.

4. APPEAL (§ III G—102)—SUFFICIENCY OF SECURITY—CASH DEPOSIT—NEW SECURITY—FURTHER DEPOSIT.

A deposit of $2,000 cash under art. 1963 C.C. (Que.), providing that "when a person cannot find surety, he may in lieu thereof deposit some sufficient pledge as security" is insufficient on an appeal from an order condemning the defendant to render an account within thirty days, or on default to pay $42,913.20, and the appeal will be dismissed, unless the defendant shall, within ninety days, either give new security to satisfy all costs and damages if the judgment is affirmed, or make a further deposit of $5,000.

Statement

MOTION to dismiss an appeal from a judgment of Charbonneau, J., on the ground of the insufficiency of the security furnished on the appeal.

The appeal was not dismissed, but a delay of ninety days was granted appellant to furnish security.

H. J. Trihey, for respondent, petitioner.
C. H. Stephens, K.C., for appellant, *contra*.

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Archambeault, C.J.

ARCHAMBEAULT, C.J.:—The respondent was plaintiff in the Court below. The action is one to account. The appellant was condemned to render an account within a delay of thirty days, failing which he was to pay to respondent a sum of $42,913.20. He appealed from this judgment and Mr. Justice Charbonneau authorized him to make a deposit of $2,000 in lieu and stead of furnishing security.

The respondent contends that this deposit is insufficient, and that the appellant was obliged to give good and sufficient security that he would satisfy the condemnation and pay all costs and damages which may be awarded in the event of the judgment being confirmed.

The appellant answers that he has not been condemned to pay a sum of money, but to do a certain act, to wit, to render an account, and that he is only obliged to give security for costs.

This question is not new. It has already come several times before this Court.

Thus, in a case of *The Montreal, Rutland & Boston Railway Co.* v. *Hatton*, 1 M.L.R. Q.B. 72, judgment had been rendered on a writ of mandamus ordering the company to call a general meeting of the shareholders to elect a board of directors. And the judgment condemned the company to pay $2,000 if the meeting was not called. The company appealed from this judgment and gave security for the costs, and the sureties furnished only justified to an amount of $400. The respondent moved to reject the security, alleging that the sureties should have justified for a sum of $2,000.

The contentions of the respondent were maintained, and a delay of eight days was granted to the appellant to give new security. This judgment was rendered in 1884 by this Court, presided over by the late Sir Antoine Aimé Dorion, M.L.R. 1 Q.B. 72.

A similar question arose in 1896 before this Court, then presided over by Sir Alexandre Lacoste, in a case of *Moore* v. *Lamoureux et al.*, Que. 5 Q.B. 532.

The appellants, in this case, and the *auteur* of the respondents, the late Simon Peters, had obtained jointly a judgment against the Harbour Commissioners of Quebec for a considerable amount, and as they could not agree between themselves as to what was to be the share of each, they agreed to discharge the Harbour Commissioners on condition that the amount of the judgment be deposited at the Union Bank, to remain deposited in their joint name until the respective shares were definitely established and that the bank be enjoined from making any payment from this deposit unless on presentation of cheques signed by both parties.

Subsequently the Court attributed to the parties an equal share of the moneys to be divided and ordered the Union Bank

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to pay their half to the Peters heirs. The other party appealed from this judgment and furnished security for $500 for the costs only.

The respondents asked for the dismissal of the appeal on the ground of the insufficiency of security.

The Court decided that the security must be for an indefinite sum, and not for a fixed amount, and declared the security insufficient, firstly, because it only covered the costs of appeal up to $500, and in the second place, because it covered the costs only. The fact that the condemnation was against a third party, the Union Bank, did not alter the situation, said Sir Alexandre Lacoste, because, according to law, the appellant must give security to satisfy the condemnation and to pay all costs and damages.

This question was also decided in the same sense in 1910 by this Court, presided over by Sir Louis A. Jetté, in a case absolutely analogous to the present one, the case of *Kerr* v. *Whitney*. That case was one in rendering of account, as the present one. The Superior Court had condemned Whitney to render Kerr an account or else to pay a sum of $66,400. Whitney appealed from the judgment and only gave security for costs.

The respondent moved to dismiss the appeal, because this security was insufficient, and we granted the motion, but allowed the appellant a delay to furnish the necessary security.

Finally in the case of *Brunet* v. *The United Shoe Machinery Co. of Canada*, 12 Que. P.R. 207, decided in January, 1911, we again decided the question in the same way. In that case the appellant had been condemned to pay six thousand and two or three hundred dollars, and he gave security for a fixed sum of $8,000, contending that this amount was more than sufficient to cover the debt, interest and costs.

The respondent moved to dismiss the appeal on the ground that the security was insufficient.

The Court upheld this contention and decided that the security could not be for a fixed amount, but had to conform to the terms of art. 1214 of the Code of Civil Procedure.* A delay

*Section 1214 Quebec Code of Civil Procedure is as follows:—

On the day fixed in the notice, the appellant must give good and sufficient security that he will effectually prosecute the appeal, that he will satisfy the condemnation and pay all costs and damages adjudged in case the judgment appealed from is confirmed; or else he must declare in writing in the office of the Court whose judgment is appealed from, that he does not object to the judgment rendered against him being executed, or he must file a copy of any judgment ordering provisional execution of the judgment appealed from, in which cases he is only bound to give security for the payment of the costs in appeal, if he fails; and, if the judgment is reversed the respondent who has caused the judgment to be executed, is bound to refund to the appellant the net amount only of the moneys levied by execution, together with legal interest, or to restore the property of which he was put in possession, together with the rents, issues, and profits since.

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was granted, however, to the appellant to furnish the required security.

In every one of the cases the Court has founded its judgment on the dispositions of the law now contained in art. 1214 C.P., which existed under the old law, and which declare that, unless the appellant declare in writing in the office of the Court whose judgment is appealed from, that he does not object to the judgment rendered against him being executed, he must give good and sufficient security that he will effectually prosecute the appeal, that he will satisfy the condemnation and pay all costs and damages adjudged in case the judgment appealed from is confirmed. The provisions of the law are imperative. They do not allow the Court any discretion. The security must be furnished absolutely according to the manner indicated by the code.

As in the cases I have cited, the appeal will not be dismissed, but a delay of ninety days is granted to the appellant to furnish the security required

Cross, J.

CROSS, J.:—In lieu of a security bond in the ordinary form to effectually prosecute the appeal and satisfy the judgment, the appellant made a money deposit of $2,000 upon leave of a Judge being given to him to do so.

The Judge, in giving the leave, reserved to the respondent its right to apply for further security, or rather, as the order is worded, "to move to appeal."

The respondent now moves that the security be declared insufficient and that the appeal be dismissed.

No doubt the rule is that the appellant must give security to effectually prosecute the appeal and to satisfy the condemnation and pay all costs and damages adjudged in case the judgment appealed from is confirmed: art. 1214 C.P.

The condemnation, which has thus to be satisfied if confirmed, is that the appellant shall render an account to the respondent of the disposal of two amounts, one of $41,026, and the other of $1,889.20, received by him for account of the respondent within thirty days, and, in default, is adjudged to pay the said two sums or such lesser sums as may be shewn by a duly rendered account to be actually payable.

The respondent refers to the appellant's own plea as proof that the appellant did receive the two sums mentioned, and says that the deposit of $2,000 is insufficient, and cites: *Lampson* v. *Wurtele*, 3 R. de Lég. 107; *Coutlee* v. *Rose*, 6 L.C.J. 186; *McCord* v. *McCord*, 5 L.N. 246; *Moore* v. *Lamoureux* (1896), 5 Que. Q.B. 532; *Montreal P. & B. R. Co.* v. *Hatton* (1884), M.L.R. 1 Q.B. 72; *Metresse* v. *Brault*, 2 L.C.J. 303; *Kerr* v. *Whitney* (1910), K.B. (Que. not reported).

In cases in which the only liability of the appellant to the respondent arising from the judgment is a liability for costs, it

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has been held, at different times, that a bond by its terms limited to costs is sufficient: *Lionais* v. *Molsons Bank*, 25 L.C.J. 226; *Rochette* v. *Ouellet*, 9 Q.L.R. 361, 6 L.N. 412; *Pangman* v. *Buchanan*, 6 L.N. 388, 27 L.C.J. 311.

It is submitted for the appellant that the rule is still more favourable to an appellant; that a bond restricted in terms to the costs only is sufficient, not merely in cases in which the judgment only adjudges costs and is negative in other respects, but in all cases in which the judgment has ordered something to be done other than payment of money; that in the present case there is no judgment for either $41,026 or $1,889.20, but merely a judgment ordering that an account be rendered; that the only debt to be secured is the debt for costs, and that the deposit of $2,000 is more than sufficient.

Reliance is placed by the appellant upon: *O'Leary* v. *Francis*, Que. 12 S.C. 243, and *Rochette* v. *Ouellet*, 9 Q.L.R. 361.

I would agree that the appellant's obligation to give security does not mean that he must give security for $41,026. He has not been adjudged to owe that sum. His principal obligation is to render account. His alternative obligation is to pay $41,026 and $1,889.20, but he is not under obligation to secure the alternative as if it were an obligation pure and simple. Our law is favourable to the debtor and the choice of alternatives is with him and not with the creditor, unless the contrary is expressly agreed.

At the same time I consider that the appellant's obligation to give security is not restricted in the way contended for by him. The case of *O'Leary* v. *Francis* was an attempt by hypothecary action on the bond to have the surety's lands charged with a judicial hypothec, and, in order to comply with the rule of law that hypothec must be for a determined sum, it was attempted to make out that amount for which the surety had justified was a compliance with that rule. That decision is inapplicable. It dealt with the bond as it was, without deciding what it perhaps should have been. The case of *Lavallee* v. *Paul*, 30 L.C.J. 164, similarly illustrates how a creditor may fail to get the benefit of the judicial hypothec contemplated in art. 2034 C.C. in consequence of defective wording of the bond.

The decision in *Rochette* v. *Ouellet*, 6 L.N. 412, makes against the appellant, in that it is formally recited that the appeal bond should be in terms of art. 1214 C.C.P., and held that the officer who received the security—a money deposit—was wrong in recording it as given for costs, notwithstanding that the only other adjudication was *en délaissement hypothecaire* and not for the payment of money.

The respondent here is therefore entitled to a bond that the judgment will be satisfied. But does that mean a bond for $41,000 or more?

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If the bond is given in terms of art. 1214 C.P., it is clear that any question as to its sufficiency becomes a matter of justification as in effect appears from the decision in *Rochette* v. *Ouellet*.

I have not before me the report of our decision in *Whitney* v. *Kerr*, decided on motion to reject the appeal for insufficiency of security. The order in that case was one of dismissal of the appeal unless new security were given, but reserving to the appellant to give "new security to cover the amount of the money condemnation pronounced by the judgment appealed from . . . . within thirty days."

In that case the judgment had ordered an account to be rendered and, in default of the account, payment of a large sum. Something may have been said in pronouncing the judgment of a nature to give the impression that the security bond should be such as to guarantee payment of the sum fixed as debt in default of rendering the account, but it was quite unnecessary to so hold for the reason that the trust company bond which had been given was but its terms limited to costs and for reasons above stated clearly could not be held to have been in compliance with the code.

Later, in *Brunet* v. *United Shoe Machinery Co.*, 12 Que. P.R. 207, the trust company bond was by its terms restricted to a maximum amount, and upon respondent's motion to reject it as being insufficient to cover the amount in debt and costs of an adverse judgment, we decided, before ordering dismissal, to allow the appellant to give a new security "without limiting the security to any fixed amount which may prove to be less than the total amount ultimately exigible." That decision should not be taken as a holding that the debtor or the surety cannot validly and properly restrict his liability to a stated total or maximum sum if the sum so stated be large enough. The mention of such a maximum sum is, in my opinion, a desirable thing.

As I have already said, where a limit or maximum of liability is not fixed in the bond, but it is given merely to satisfy the judgment, any question of sufficiency becomes a matter of justification by the sureties. But account has to be taken of the rule of art. 1963 C.C., that, "when a person cannot find surety he may in lieu thereof deposit some sufficient pledge."

It is under the operation of that rule that the appellant has made a security deposit in this case. It is a rule which is extensively interpreted in favour of the debtor. The authorities in that sense are collected in Beauchamp, C.C., art. 1963 Doct. Franc. Nos. 1 and 2. Our Courts have given effect to it in such ways as by approving of transfers of hypothecary debts as security or of pledging moveables which already hap-

pened to be held by the creditor: *O'Brien* v. *McLynn*, 3 L.N. 143; *Lacey* v. *Drapeau*, *ib.* 194; *Pangman* v. *Pauze*, 27 L.C.J. 147; *Jette* v. *McNaughton*, 21 L.C.J. 192; *Boxer* v. *Judah*, M.L.R. 3 Q.B. 320.

When, as in this case, the security tendered is in the form of a cash deposit, it is clear that the question of justification of sufficiency is not (as in the ordinary case of a bond to satisfy the judgment) one which is separable from the *acte* of security, but the two things necessarily become merged into one.

I infer then that where the security is by special deposit, or where it is by a judicial bond wherein a maximum or limit of liability is stipulated, in either of such cases the amount of the deposit (whether in cash or in marketable securities) or the maximum sum must be large enough to satisfy the adjudication in debt, interest, costs and "damages," meaning by "damages" such costs and expenses as can be taxed—in case the judgment is affirmed.

I conclude then, on the one hand, that the appellant is in error in contending that he need give security for nothing except the costs, and, on the other hand, that the respondent would also be in error if its contention is that it is entitled to security for $41,026 and $1,889.20. We cannot assume that the appellant will not obey the order to render an account. The matter in issue is a question of accountability, not of debt. Upon an account being rendered and litigated, the legal possibility is that the debt may be decided to be due either by the plaintiff or by the defendant or by neither.

I conclude that the deposit of $2,000 is not a sufficient security that the appellant will render an account in case he shall fail on his appeal.

In view of the fact that he has adopted the mode of a deposit for security, and has deposited a sum which was considered by a Judge to be sufficient for the time being, I consider that the appellant is entitled to a decision which will shew what his deposit should be. The amount would have to be fixed somewhat arbitrarily, just as is done in the case of fixing bail or security in cases of *capias* or attachment in actions for unliquidated damages or of admission to bail in criminal procedure. Regard, however, can be had to the fact that the sum of $41,026 consists of an apparent total of sums which went into the appellant's hands, from which nothing is deducted for outlay, for behoof of the company, which the appellant as its officer would presumably have made.

Regard may also be had to the fact that, though the appellant denied having caused the sums composing the other item of

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$1,889.20 to be paid to J. F. Fraser, the judgment holds that he did cause them to be so paid.

My conclusion would be to adjudge that the appeal be dismissed unless the appellant shall within ninety days either give new security before a Judge of this Court to satisfy the judgment appealed from, or shall for such security make with the clerk of this Court a further deposit of $5,000 in current money or securities acceptable to a Judge of this Court.

Order accordingly.

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July 29.

SWINEHAMMER v. HART.

Nova Scotia Supreme Court, Graham, E.J., Meagher and Drysdale, JJ. July 29, 1912.

1. TRESPASS (§ I B—10)—POSSESSORY TITLE TO SUPPORT ACTION—CONSTRUCTIVE POSSESSION AS AGAINST TRESPASSER.

A title by possession to woodland may be based upon occupation under colour of title and acts of constructive possession such as the building of a lumberman's sluice and operating as a lumberman over the lands, although not enclosed by fences, to support an action against a trespasser.

2. ADVERSE POSSESSION (§ I B—5)—BLAZING LINES AROUND LAND BY SURVEYOR FOR OCCUPANT—ABSENCE OF PUBLICITY.

A blazed line running around the whole of the land in question, run by a private surveyor at the instance of the occupant, will not establish in his favour a title by possession although no disturbance thereof was made for the statutory period as such act lacks publicity and conveys no sufficient intimation that the occupant is claiming title to the whole of the area included within the blazed lines. (*Per* Graham, E.J.).

[*Wood* v. *Leblanc*, 34 Can. S.C.R. 627, followed.]

3. COSTS (§ I—19)—APPORTIONMENT—DEFENCE SUCCEEDING IN PART.

Where the defendant in an action of trespass defends as to the whole of the area in dispute and fails as to part, the plaintiff being successful in part should not be ordered to pay the whole of the defendant's costs as well as his own costs of action.

4. COSTS (§ I—19)—APPORTIONMENT—DIVISION OF SUCCESS—N.S. JUDICATURE ACT, R.S.N.S. 1900, CH. 155.

Since the Nova Scotia Judicature Act, where the success is divided between the parties, the costs may be apportioned in accordance with the findings on the several issues.

Statement

APPEAL from the judgment of Russell, J., in favour of defendant, in an action claiming damages for trespass to land, except as to certain enclosed areas of which plaintiffs were proved to have been in possession for a period of over twenty years. For trespasses committed within that period the learned trial Judge allowed the plaintiffs ten dollars damages. Costs of the action were allowed to defendant.

The judgment below was confirmed except as to costs and as to these the judgment was varied.

The facts are more fully stated in the opinion of GRAHAM, E.J., on the appeal.

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Argument

H. Mellish, K.C., and *H. W. Sangster*, for appellant:—Plaintiff was in constructive possession of the whole lot by descent. His father claimed possession of the whole of the land in dispute and possession derived by descent gives colour of title: *Saxton* v. *Hunt*, 20 N.J.L.R. 487; *Smyth* v. *McDonald*, 1 Old. 274, 281. Plaintiff's boundary was sufficiently indicated by old marks and there was no need of a fence: Armour on Titles, p. 307 *et seq.*; *Steers* v. *Shaw*, 1 O.R. 26. The trial Judge gave plaintiff $10 damages but refused him costs which he was entitled to, as costs should follow the judgment. Defendant has not located his land according to the grant of the township of Falmouth, as in the Crown land office, while plaintiff has. Defendant admits trespass south of the McCollum line. Defendant claims that he logged on the land 29 years ago and that he built a sluice across it in the fall of 1902, but he must shew that it was not fenced previously.

W. E. Roscoe, K.C., and *W. M. Christie*, K.C., for respondent:—Defendant acquired title to the land by deed in 1901 and did not build the sluice until 1902. It was built before the fence was put around the land. There never was a fence north of the McCollum line. Plaintiff did not succeed substantially in the action and therefore he was not entitled to costs: *Myers* v. "*Financial News*," 5 T.L.R. 42; *Neale* v. *Winter*, 9 Grant's Ch. (Ont.) 261. Land must be enclosed in order to give title by possession: *Bentley* v. *Peppard*, 33 Can. S.C.R. 444; *Hunter* v. *Farr et al.*, 23 U.C.Q.B. 324; *Saxon* v. *Hunt*, 20 N.J.L.R. 487; *Miller* v. *Shaw*, 7 S. & R. 143. Plaintiff got what his father had and no more. His father had no title to the land and therefore plaintiff acquired none. The sluice was built with the intention of permanently occupying the land: *Ellicott* v. *Pearl*, 10 Peters 188; *Taylor* v. *Archbald*, 9 N.S.R. 233. As to costs, see *In re Foster*, 8 Q.B.D. 515.

Mellish, K.C., replied.

Graham, E.J.

GRAHAM, E.J.:—This is an action of trespass brought in respect to a tract of land comprising some three hundred and fifty acres upon the New Ross road in Leominster in the county of Hants.

The plaintiffs are obliged to rely upon actual possession and the greater part of the area is woodland, about 50 acres being cleared. The defendant justifies as a contractor under the Pugsleys, two brothers trading as the Parrsboro Lumber Company.

The defence is pleaded as to the whole area. There is a denial of the trespass, a denial of property or possession in the

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plaintiff and an allegation of freehold in the Pugsleys under whom the defendant justifies.

The judgment proceeds upon the theory that the defendant or rather the Pugsleys had proved a title and that the plaintiffs could only recover by making out a case of possession under the Statute of Limitations.

In my opinion it is put forward as a case of the plaintiffs having actual occupation, a title in itself against persons having no better title or, as they are called in the books, strangers.

A portion of the front of the lot has been cleared and cultivated. The father of the plaintiffs, George Swinehammer, settled upon it about 45 years before the trial, built a house and barn upon it near the road. Later another house was built by him on that site and it having been burned down a younger son built another and is in occupation. Henry, one of the plaintiffs, twenty-two or twenty-three years before the trial built a house and barn further to the rear of the lot and has since occupied that. The plaintiff, Rupert Swinehammer, also has a house and barn nearer to the road again. George, the father, died about 14 years before the trial upon the place. George Swinehammer and the plaintiff Henry, built a saw-mill upon the land about thirty years before the trial which has been operated ever since.

The plaintiffs claim actual possession at the time of the trespass, mainly through the following incidents:—

George Swinehammer, as I said, settled near the New Ross road. Very early in the settlement he employed Harvie, a surveyor, who followed around the side lines of the lot and the rear line blazing them afresh. The side lines have been respected by his neighbours on either side. As he cleared and took in land a fence was built on one of the side lines and this ultimately extended some distance beyond what has been conceded in the decree. Very early in the settlement a waggon road, at first a sled road, was constructed to the rear of the whole lot and through the wood lot and that has been used by plaintiff. Specifically, it has been used for getting out wood, logs and hay from a piece of meadow. Apparently it was not originally constructed by the plaintiffs or by George Swinehammer.

The plaintiffs have been cutting at this mill ever since it was erected, they say every season from ten to twenty thousand feet a season and hauling the lumber to Windsor and selling it. All of the logs come from this woodland. They say from all over it and that they cut some every winter and that they got it out and sawed it in the spring and summer.

In November, 1902, on the advice of a solicitor they constructed around the wood lot in dispute a brush fence and this has been renewed in places since.

Midway between the New Ross road and the rear of the lot on Bill's Brook and approached by a road from the old waggon road, is a piece of meadow, half an acre, which was cleared up 13 years before the trial and kept fenced in for 12 years. A dam was built on the brook and it was thus overflowed and utilized. Hay had been taken from it during this period. There was another meadow of about a quarter of an acre on the same brook utilized in the same way and fenced in for a period of 8 or 9 years before the trial. This was situate near the north-west corner of the lot.

The defendant contends that the land described in the plaintiff's statement of claim consists of a part of lot thirty-one north of the road and part of lot thirty to the north of that comprised in the township of Falmouth.

The Pugsleys have not a documentary title to the part they claim. They have not a title traced back to the Crown with a link or so wanting which might be remedied by a presumption by reason of possession.

There is a grant from the Crown of 1761, the township grant of Falmouth, comprising 50,000 acres in which this tract is situated, but the allotment or partition book was not put in evidence and for over one hundred years there is no pretence of a deed to anyone. There are, no doubt, true owners somewhere, but which of the sixty-five grantees got this area and what happened to the title of the true owners for a century we do not know.

The Pugsleys claim under deeds commencing in 1872 with a deed from one Vaughan, apparently covering the whole area claimed to have been occupied by George Swinehammer and his descendants.

The defendants have given evidence tending to shew that some of these proprietors under their deeds cut logs upon the land, namely, Amos Collins & Co. about once in 1872-4. Hobart, the next purchaser, who had a deed 1874-80 at least once. McCollum, who was a transferee, between 1881-1884, and who contracted with one Beach to log it, and Beach did so taking some 30,000 feet of pine and spruce one season.

The next incident is in 1896 when Benjamin, who had become a purchaser, employed McCollum to run the lines of this and other land. He apparently also employed the witness Salt to watch the property.

On the 5th August, 1901, the Pugsleys, or one of them, purchased from Benjamin parts of lots 30 and 31 with other land. Benjamin, who no doubt had the land surveyed with a view to a transfer, recognized apparently the actual possession of the plaintiffs on a part of both lots and ringed them off.

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McCollum, in surveying, blazed out or marked an arbitrary line on the ground excluding what he thought was the plaintiffs' area of occupation in front, and in the transfer to the Pugsleys this area is not included.

This will account for the first exception in the decree of an area "south of the McCollum line" in favour of the plaintiffs.

The second exception in the decree is the first meadow I have spoken of which was not excepted by the McCollum survey.

The third exception is an area to the east of the old waggon road which the plaintiffs proved had been cleared and fenced by them.

The plaintiffs contend that failing their claim to the whole they are entitled to a piece which had been cleared and fenced on the other side of the old waggon road not excepted in the decree.

Coming back to the Pugsleys in 1902-3, they constructed from their mill on Canoe lake in the adjoining county a sluiceway which crossed the lot on its way to navigation for the purpose of carrying sawn lumber from the mill.

The defendant logged this lot in 1910-11, most of it after the action, and after cutting the logs with a portable mill carried the lumber away by means of this sluice. It appears that during the period of its use in the summer, a man walked up and down its course to keep the lumber moving.

Since the case of *Asher* v. *Whitlock*, L.R. 1 Q.B. 1, it is clear that one stranger to the title if in actual possession may have an action against another stranger who cannot shew a better title. And in the case of *Freeman* v. *Allen*, 2 Old. 293, Young, C.J., citing that case, gives a very forcible illustration in connection with wooded land. I refer also to *Boyd* v. *Millett*, 9 N.S.R. 292, 296 (Ritchie, E.J.).

I think whoever has to decide a case of this character must reckon with the case of *Wood* v. *Leblanc*, 34 Can. S.C.R. 627, and some passages in the opinions. Under it I think the plaintiffs could not recover against the Pugsleys; neither could the Pugsleys recover against the plaintiffs if the positions were reversed and the act of cutting on this *locus* had been their act and the Pugsleys had been bringing the action.

Some of the passages in the opinions are very applicable to the case of a contest between the true owner, *i.e.*, one having a good documentary title and a person claiming by adverse possession under a statute of limitation. And two of the cases relied on are cases of that kind, a leading case from New Brunswick, namely, *Des Barres* v. *White*, 3 N.B.R. 595, and *Sherren* v. *Pearson*, 14 Can. S.C.R. 581, approving of that case.

But *Wood* v. *Leblanc*, 34 Can. S.C.R. 627, is a case of a contest between two persons neither of whom had a good documen-

tary title, and it makes it very difficult, in this province at least, to prove the ownership of woodland unless one is able to trace a perfect chain of title back to the Crown, and even then he would have to shew the calls mentioned in the grant, often a blazed line long since destroyed. I think it was possible in Nova Scotia to shew ownership in woodland, at least where there was colour of title, without residence on part or cultivation of part and without an enclosure, only mere use of it as woodland. I refer to *DesBarres* v. *Shey*, 8 N.S.R. 327, in the Privy Council, 29 L.T.N.S. 593 (at the end). I refer particularly to the opinions below to shew that there had not been during twenty years before the trial any such acts evidencing ownership although at one time previously there had been some clearing and fencing of a small part of a lot of 158 acres in the whole, which had been abandoned and even the part that had grown up in woods. In the Court below the case went solely on the ground of possession.

In *Neill* v. *Duke of Devonshire*, 8 App. Cas. 135, at p. 166, Lord O'Hagan said:—

> The proprietor of a river or a waste cannot be expected to prove proceedings indicative of his ownership on every portion of the one or the other. He can only shew his dominion over certain parts with a claim of title to the whole; and whether as to the whole evidence as to the parts can justly be found, the desired inference must be determined by its character and extent and the effect which can be fairly given to it by an informed tribunal.

After all it is a question of fact, and I think that in respect to this *locus* the Pugsleys had a better title than the plaintiffs.

The plaintiffs' great difficulty is that this was a large area of woodland, some 350 acres, on which George Swinehammer settled, so large that it is difficult to say that he or the plaintiffs rather, had actual possession of this part.

I concede that it is not to be a literal possession of the foot over every part (*Jones* v. *Williams*, 2 M. & W. 236, 330 (*per* Parke, B.) frequently cited since), but there must be some kind of a claim of title to the whole area involved in the dispute as well as the entry upon and actual occupation or cultivation of part.

The blazed line which appears to have been made before George Swinehammer came there and which was kept up at the sides mostly by the adjoining owners and in the rear apparently by no one, is a very faint assertion of title to that whole area. There is no publicity about the employment of a private surveyor to go around the lines in the woods. Moreover, there was this peculiarity about it that it took up part of township lot 31 where the settlement began and where most of the buildings were constructed, and also part of lot 30 to the north where the *locus* is. These lots may not be separate lots on the ground, but the plaintiffs found themselves with two sets of neighbours,

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front and rear, on their east side line. It hardly identified to the neighbourhood what was claimed. The brush fence was started by the plaintiffs after the struggle began and it is open to the observation of a very sagacious Judge, Halliburton, C.J., in *Cameron* v. *McDonald*, 3 Thoms. 240, a land case: "But if two persons are seen, each with a hand upon a hat and struggling for possession of it, the law can presume nothing in the favour of either. Nor could any mark made by either on the hat pending the struggle be received as evidence of ownership."

The saw-mill, although suggestive, hardly dominates the woodland at the rear. The plaintiffs are unfortunate.

A will or deed from George Swinehammer, the father (even one imperfectly executed) describing the area instead of trusting to the Statute of Descent, would have made colour of title and, perhaps, won the game. But this blazed line and brush fence will not satisfy the severity of the law.

The Pugsleys have a better kind of possession. They apparently paid a price for this land and they spent money building the sluice. There has been the formality of deeds and under them a cutting on the area in dispute which the Swinehammers ought not to have ignored.

Reference was made at the hearing to a passage in the opinion of Dodd, J., in *Smyth* v. *McDonald*, 1 Oldright 274, 286. He was dealing with the subject of whether an inchoate title by adverse possession short of the statutable period enured to the sons heirs in possession on the death of the ancestor in possession and could be tacked to their possession, a descent cast, in which case the person out of possession would be put to his action of ejectment against the heirs. He called that right of the heirs colour of title and that is a common enough expression in American cases. But if he meant that this kind of colour of title was like the colour of title which a person has when he has a deed or even a defective deed describing the premises which extends the occupation of part to all the land within the limits of the description, I think, with great deference, he made a slip. It would carry this case no further because the plaintiffs still have the difficulty, what are the limits to which their acts of occupation are to be extended. There is only the blazed line and that inherently fails for want of publicity and as conveying no intimation that the party is claiming title to that area.

The plaintiffs contended that there was an actual occupation of a margin beyond the line marked by McCollum. The finding of the trial Judge is, I think, against that. It is possible that at one time there had been cutting of trees and using the land for planting slightly beyond it at one point, not cultivation, I think. But this is stoutly met by the witnesses for the

defendant who searched for alleged remains of a brush fence enclosure and could not find them. If it ever existed it apparently had very much gone down before the trial and I think that even the claim for this margin is open to some of the objections taken in one of the opinions in *Wood* v. *Leblanc*, 34 Can. S.C.R. 627.

I think that the appeal should fail except in regard to the matter of costs.

Graham, E.J.

The learned trial Judge gave the plaintiff ten dollars damages in respect to the areas excepted in the decree and it is not proposed to disturb that. He might, under the rules, have deprived them of costs. But, notwithstanding their success in part he gave the defendant all the costs of the action against them. It will be remembered that the defendant defended as to the whole area. And he did that although the deed from Benjamin excepted the area mentioned in the decree as to the fifty acres. And the plaintiffs ran the risk of losing even that area at the trial.

In no case could the plaintiffs, in my opinion, in this common law action, having succeeded below as to part and having proved trespassing on that part, been ordered to pay the costs of the action.

In the early days of the Judicature Act it appears that Baron Huddlestone, in an action for defamation, made a successful party pay costs, but after all of the cases on that subject since that time, I think, that would hardly be considered a precedent, and that, in any event, this was not a case for such a disposition of the costs. Before the Judicature Act the plaintiff would have had all of the costs. Since the Judicature Act the costs in such a case are frequently apportioned according to the disputed matters found one way or the other. That, I think, is the proper disposition here and to that extent the appeal should be allowed but without costs of the appeal, as there has been a failure on the substantial matter. The plaintiffs will have the general costs of the action but not the costs incidental to the matters in which they have failed, and in respect to these the defendant will have his costs.

Drysdale, J.

DRYSDALE, J.:—I agree as to the conclusion reached in the opinion of Mr. Justice Graham as to the proper disposition of this appeal.

In my view, the plaintiff has neither possession nor title to the rear portion of the lot in question. The contest herein really is over the rear portion. The front portion the plaintiffs have had in possession for a sufficient length of time to enable them to hold and on this portion there was a slight act of trespass by the defendant, for which plaintiffs should recover nominal damages. As to the rear portion or the lumber lands cut by de-

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fendant I am of opinion that defendant had, and has, such title that, as against plaintiffs, he is in the better position.

The defendant bought and acquired such title as he sets up under a deed giving a specific description of the lands in the rear. Under his deed he entered and took possession of the lands described therein, first by erecting all across the rear portion thereof an expensive wooden structure known as a lumberman's sluice (a permanent structure) and secondly by operating effectively as a lumberman over the lands so purchased and described in the deed. I think the defendant had and has, as against plaintiffs, colour of title, and the possession taken by him is and ought to be held constructive possession of the lands described in his deed. To my mind the plaintiffs absolutely failed in establishing possession of the rear portion of the lot in question. I think the proper order below would have been recovery by the plaintiff with costs and nominal damages in respect of trespasses committed on that portion of the grant part held by plaintiffs comprised within their clearings, and costs to defendant in respect to the issues raised over the rear portion, the appeal to be allowed without costs.

Meagher, J.

MEAGHER, J.:—I agree in the result.

Judgment below varied.

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May 15.

HAMILTON v. ISAACSON.

Alberta Supreme Court. Trial before Walsh, J. May 15, 1912.

1. EVIDENCE (§ II K—318)—ONUS OF SHEWING THAT PROMISSORY NOTE WAS INDORSED BY THE PAYEE—ACTION BY HOLDER.

The onus rests upon the holder of a promissory note payable to the order of the payee, to shew in an action thereon, that it was indorsed to him by the payee or someone by him duly authorized to do so.

2. BILLS AND NOTES (§ III A—59)—RIGHTS AND LIABILITIES OF INDORSER—ENDORSEMENT IN NAME OF PAYEE PER A STRANGER.

Where a promissory note which was payable to the order of the payee, was indorsed to the plaintiff in the name of the payee per the name of another party who was a stranger to the note, the plaintiff cannot recover thereon without shewing that such person was duly authorized by the payee to indorse the note for him.

3. FRAUD AND DECEIT (§ VI—25)—JOINT AND SEVERAL PROMISSORY NOTE OBTAINED FROM SEVERAL PURCHASERS—CONTRACT FOR PROPORTIONATE LIABILITY.

A note is properly held to have been obtained by fraud where the agent of one who sold a stallion to a number of persons, fraudulently obtained their signatures to a joint and several note, instead of one by which each was liable only for his proportionate part of the purchase-price, as was contemplated by the agreement entered into by the parties.

4. APPEAL (§ VIII E—686)—EFFECT OF DECISION NOT DISPOSING OF QUESTION OF LIABILITY—LEAVE TO BRING ANOTHER ACTION.

Where an action on a promissory note is dismissed on grounds which do not effectually dispose of the question of the liability of the maker of the note, leave may be reserved to the plaintiff to bring another action thereon.

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Statement

ACTION to recover the amount of a promissory note made by the defendants payable to the order of one W. C. Kidd, and discounted by the plaintiff. The defence was that the note had been fraudulently obtained and that the plaintiff was not the holder in due course. The sufficiency of the proof of endorsation was also questioned.

The action was dismissed on the latter ground with leave reserved to the plaintiff to bring another action upon the note.

P. J. Nolan, K.C., for the plaintiff.

Greene & Payne, for the defendants.

Walsh, J.

WALSH, J.:—The plaintiff sues as the holder in due course of a promissory note made by the defendants, payable to W. C. Kidd, or order. The note is indorsed as follows: "W. C. Kidd, per p.p. S. P. Thompson." This note was given to present part of the purchase-money of a stallion purchased by the defendants from Kidd, through Thompson. The plaintiff bought this note from Thompson a few days after it was made and long before its maturity. He gave his cheque, payable to S. P. Thompson or order, for the price agreed upon between them for this note. No evidence was given at the trial of any authority on the part of Thompson to indorse Kidd's name on this note or to sell the same

The onus is upon the plaintiff of establishing his right to collect the amount of this note from the defendants; and this he can do only by proving the indorsement of the same to himself, either by the payee or by some one duly authorized by him to indorse his name upon it. In the absence of any evidence whatever to shew the right of Thompson to negotiate this note, the plaintiff has failed to establish his right to payment of the same; and this action must, therefore, be dismissed with costs.

In the event of an appeal being successfully taken from this judgment, I have thought it better to make such other findings as may be necessary in order that an appellate Court may fully dispose of the case—the defendants' counsel having intimated at the conclusion of the case that he would not call any evidence, and having expressed his willingness to rest his chances of success upon the evidence adduced by the plaintiff.

I find that the note in its present form was procured from the defendants by the fraud of Thompson. The evidence of the plaintiff's witnesses establishes the fact that each of the defendants was to be liable for one-twelfth only of the total purchase-price of $3,600, which purchase-price was divided into three payments of $1,200, so that the liability of each defendant on each note should have been $100.

The note as prepared by Thompson and signed by the defendants is a joint and several note for $1,200; and the evidence satisfies me that this is due to the fraud of Thompson. If,

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however, the plaintiff was the holder in due course of this note, this defence would not avail the defendants. The plaintiff is the only witness who was called to shew the circumstances under which he became the holder of the note. I believe that he told the truth in this respect, and I give full credence to his story as to the circumstances under which he bought the note from Thompson.

I do not think that he wilfully abstained from making further inquiry as to the origin of the note; but I think that he was tempted, by the large discount which Thompson offered him, to purchase the note without further inquiry. The appellate Court should be able, upon this finding, to say whether or not the plaintiff is the holder in due course of this note, if it is of opinion that the note has been properly indorsed to and become the property of the plaintiff.

As the dismissal of this action is upon a ground which does not effectually dispose of the question of the defendants' liability upon the note in question, I direct that the right shall be reserved to the plaintiff to bring another action upon this note, if he so desires, and if I have the power so to direct.

Action dismissed.

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Ontario Divisional Court, Mulock, C.J.Ex.D., Clute, and Riddell, JJ. June 17, 1912.

1. PUBLIC LANDS (§ II—21)—PATENT—RIGHTS OF GRANTEE—ENLARGEMENT.

Where a grant from the Crown containing no special clause in respect of the water power or the building of a mill, and expressly reserving to the Crown, "the free uses, passage and enjoyment of, in, over and upon all navigable waters that shall or may be hereafter found on or under or be flowing through or upon any part of the said parcel or tract of land hereby granted as aforesaid," the grantee's rights are limited by the terms of the patent and cannot be enlarged by the official correspondence and documents of the Crown Lands Department relating to the issuing of the patent.

[*Wyatt* v. *Attorney-General of Quebec*, [1911] A.C. 489, followed.]

2. EVIDENCE (§ IV I—431)—DOCUMENTARY EVIDENCE—PATENT—ENLARGEMENT BY REFERENCE TO CORRESPONDENCE.

The rights of a grantee from the Crown under a patent are limited by the terms of the patent and these cannot be enlarged by reference to petitions, memorials, reports or correspondence in the Crown Lands Department leading up to the grant.

3. EASEMENTS (§ II B—19)—RIGHT BY PRESCRIPTION—NATURE OF USER—LIMITATIONS ACT (ONT.) 1910, 10 EDW. VII. CH. 34, SEC. 35.

A prescriptive right, claimed pursuant to the Limitations Act, 1910, 10 Edw. VII. (Ont.) ch. 34, sec. 35, to deposit sawdust and other mill refuse in a stream is an inchoate right until action is brought, and the user to support the same must be continuous and of right.

[Halsbury's Laws of England, vol. II., p. 272, sec. 542, specially referred to.]

4. EASEMENTS (§ II B—19)—PRESCRIPTIVE RIGHT TO POLLUTE WATERS—INCREASING THE REFUSE.

The prescriptive right to pollute a stream by depositing the sawdust and mill refuse, arising from the operation of a one saw sawmill, does not justify the pollution thereof by the additional sawdust and refuse consequent on the operation of many saws in the mill, as well as shingle and lath mills, an edger and other modern appliances, notwithstanding that this evolution was gradual and that the rights of the mill-owner lower down on the stream were not materially affected to his prejudice until forty years after the erection of the original mill.

5. EASEMENTS (§ IV—46a)—PAYMENT OF DAMAGES—INTERRUPTION OF USER.

Where a mill-owner operating a mill higher up on the stream on which another mill is located, permitted sawdust and mill refuse to pass into the stream, in much larger quantities than formerly, and for the damages so occasioned paid to the lower mill owner a certain sum of money annually for a number of years, until the erection of a burner in connection with his mill for the destruction of the sawdust and refuse made it no longer necessary to deposit it into the stream, this payment operates as an interruption to the prescriptive right.

[*Gardner* v. *Hodgson's Kingston Brewery Co.*, [1903] A.C. 229, referred to.]

6. EASEMENT (§ II A—7)—LOST GRANT DOCTRINE—PRESUMPTION.

Where an action is brought by a mill-owner against the owner of a mill higher up on the stream, claiming to have the stream flow to and through his lands, without obstruction, and without the same being polluted by the throwing in of sawdust and mill refuse, which prevented his mill from running, the material damage dating from a period when, from the introduction of additional machinery in the mill, the sawdust and refuse had greatly increased in volume, and, in consequence, the owner of the mill higher up the stream had for several years up to the time of the installation of a burner in connection with his mill operation, by which the sawdust and mill refuse was destroyed, paid to the owner of the mill lower down the stream an annual sum, as damages, an implied grant so to pollute the stream cannot be presumed, even where the original grant from the Crown was made on the understanding that the grantee should build a saw-mill thereon.

[*Angus* v. *Dalton*, 3 Q.B.D. 85, 4 Q.B.D. 162; *Dalton* v. *Angus*, 6 App. Cas. 740; *Birmingham, Dudley & District Banking Co.* v. *Ross*, 38 Ch.D. 295, referred to.]

7. EVIDENCE (§ II K 2—338)—PRESUMPTION AS TO "LOST GRANT."

Where there is evidence of user, open and uninterrupted for twenty years, the jury may and ought to presume a lost grant.

[*Re Cockburn*, 27 O.R. 450, followed; Goddard's Law of Easements, 7th ed., pp. 176 to 182, referred to.]

8. EASEMENTS (§ II B—19)—PRESCRIPTIVE RIGHT TO POLLUTE STREAM—CONTENTIOUS USER—OBJECTIONS.

A prescriptive right to dispose of sawdust and mill refuse by throwing the same into a stream does not arise from the mere fact that this had been done for more than the statutory period of prescription, where it is shewn that the user was contentious and objected to, and was recognized as such by the payment of damage claims and the erection of a burner to destroy the refuse.

[*Burrows* v. *Lang*, [1901] 2 Ch. 502, 510, and Goddard's Law of Easements, 7th ed., p. 258, specially referred to.]

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9. PAYMENT (§ IV—30)—APPLICATION—ABSENCE OF CLAIM AT TIME OF MAKING.

Where upon the payment of a certain sum as damages for the pollution of a stream no suggestion was made that the payment was for the excess over and above a limited prescriptive right and no such claim was advanced, the claim should be rejected.

10. LIMITATION OF ACTIONS (§ II G—67)—PRESCRIPTIVE RIGHT TO POLLUTE STREAM—WHEN STATUTE BEGINS TO RUN.

The statutory period of prescription for the use of a stream to deposit sawdust and mill refuse in, begins to run from the date of the first substantial injury causing damage to the mill-owner, lower down the stream.

[*Crossley & Sons, Limited* v. *Lightowler*, L.R. 2 Ch. 478, 481; *Goldsmid* v. *Tunbridge Wells Imp. Commissioners*, L.R. 1 Eq. 161; *Attorney-General* v. *Acton Local Board*, 22 Ch.D. 221, referred to.]

11. WATERS (§ II E—100)—POLLUTION—RIGHT OF RIPARIAN OWNER AS TO.

In the absence of any easement a person may not pollute the water of a natural watercourse to the prejudice of other persons entitled to the use of the water.

[*Wood* v. *Waud*, 3 Exch. 748, 18 L.J. Ex. 305, followed; see also Goddard's Law of Easements, 7th ed., p. 106, and Halsbury's Laws of England, vol. XI., pages 317, 318.]

12. WATERS (§ II E—100)—SAW-MILL REFUSE—POLLUTION OF STREAM—STATUTORY PROHIBITION.

No prescriptive right and no presumption of lost grant can arise in contravention of express statutory law prohibiting the acts in question; therefore, a saw-mill owner can acquire no such right to foul a stream by depositing sawdust and mill refuse therein contrary to the Navigable Waters' Protection Act, R.S.C., 1906, ch. 115, sec. 19.

Statement

APPEAL by defendants from the judgment at the trial before LATCHFORD, J., without a jury.

The plaintiff was the owner of a lumber mill and farm on Constant creek, in the township of Grattan, and the defendants were the owners of a mill, above the plaintiff's mill, upon the same creek.

This action was brought to recover damages for injury done to the plaintiff by the defendants in fouling the stream and obstructing the flow of water to the plaintiff's mill by throwing refuse in the creek and otherwise injuring the plaintiff.

The appeal was dismissed, RIDDELL, J., dissenting.

P. White, K.C., for the plaintiff.

T. W. McGarry, K.C., for the defendants.

Latchford, J.

March 3, 1911. LATCHFORD, J.:—The defence in this case is, that the defendants have a right by prescription, existing for upwards of forty years prior to 1896, to damage the property of the plaintiff. Other issues are, it is true, raised, but I regard them as of no importance.

The mill built in 1855 contained but one saw, according to the evidence taken at Ottawa. As the mill is now, it is equipped with many saws,—with shingle and lath mills, an edger, and other similar appliances. It is not clearly shewn when the property of the plaintiff was first prejudicially affected (see judgment of

Sir G. J. Turner, L.J., in *Goldsmid* v. *Tunbridge Wells Improvement Commissioners* (1866), L.R. 1 Ch. 349, at p. 352), when the primitive state of the mill was altered, or when the various improvements that now exist were made. But it is, I think, fair to assume that the evolution from the one saw of 1855 to the present complex condition has been gradual, and that the property of the plaintiff was not materially affected to his prejudice until 1895 or 1896.

The payment of $100 to the plaintiff in 1896, more than forty years after the original saw began cutting, is some evidence that the refuse then discharged over his lands was in excess of what the defendants had any possible right by prescription to send down upon him.

It is disputed that any right to pollute such a stream as flowed between the two mills can be established by lapse of time. This contention would be tenable if the fouling amounted to a public nuisance: see *Blackburne* v. *Somers* (1879), 5 L.R. Ir. 1. Although an undoubted nuisance to the plaintiff, the pollution of the stream has not been shewn to be a nuisance to the public. In the latter event no prescription could, of course, arise. If prescription as of right existed in favour of the defendants in 1896, it existed only to the extent of the primitive and limited fouling of the stream in 1856, and the years immediately following, which did not materially injure the plaintiff. The payments made by the defendants to the plaintiff for some years after 1896, in addition to what was paid in that year, were, in my opinion, an acknowledgment that the fouling of the stream during those years was greater than the defendants enjoyed as of right, and enjoyment as of right was necessary before the defendants could claim the benefit of the statute R.S.O. 1897, ch. 133, sec. 35. Any easement respecting the saw-dust or refuse from the mill of 1855 or 1856, which the defendants were entitled to, could not be materially altered or increased to the further detriment of the plaintiff. It was held in *Bealey* v. *Shaw* (1805), 6 East 208, that a mill-owner, who had by twenty years' user acquired a right to divert part of a stream, was liable to an action at the suit of the owner of a mill lower on the stream for a subsequent diversion to the lower mill-owner's injury.

Baxendale v. *McMurray* (1867), L.R. 2 Ch. 790, cited by counsel for the defendants, is not an authority in their favour. It simply decides that a change in the quality of the pollution, where a right to pollute exists, does not destroy the easement, and that the onus of proving an increase (which lay upon the plaintiff) had not been satisfied.

In the present case it had been established that there was an increase in the pollution of the stream, especially in 1896, and the three or four subsequent years. In *McIntyre Brothers* v. *McGavin*, [1893] A.C. 268, Lord Watson says, at p. 277: "A proprietor

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who has a prescriptive right to pollute cannot in my opinion use even his common law rights in such a way as to add to the pollution." By the compensation made to the plaintiff during this period, any right of the defendants, even their limited right of 1855, was interrupted, and a period of twenty years has not since elapsed. If the refuse of the mill reached the burner and was there consumed, all damage to the plaintiff would be prevented. It is, however, no part of the duty of the Court to inquire how the defendants may best prevent the nuisance to the plaintiff.

I direct that judgment be entered after thirty days in favour of the plaintiff for $200 and costs. An injunction is also granted restraining the defendants from discharging refuse into Constant creek to the injury of the plaintiff; but the operation of the order is to be suspended for four months to enable the defendants so to alter their mill that no additional damage shall be done.

The defendants appealed from the judgment of LATCHFORD, J.

The appeal was dismissed, RIDDELL, J., dissenting.

W. N. Tilley, for the defendants.

P. White, K.C., for the plaintiff.

The arguments of counsel and the authorities cited are referred to in the judgments.

Clute, J.

June 17, 1912. CLUTE, J.:—The plaintiff is the owner of lot 10 in the 1st concession of Grattan, through which flows Constant creek, and has had for a period of years a dam and water power on the said creek where the same crosses his said lot, from which he derives power to operate a chopping-mill. The defendants own lot No. 9 in the second concession of Grattan, through which also flows Constant creek, where the same crosses their said lot, and thereby they operate a saw-mill on the said lot. The lands and mill of the defendants are higher up on the creek than the lands and mill of the plaintiff. The plaintiff claims to have the stream flow to and through his lands without obstruction or hindrance and without the same being polluted.

He charges that the defendants, at various times during the years 1905 to 1909 inclusive, polluted the stream by throwing into the same saw-dust and other mill-refuse, thereby causing damage to the mill-pond and water power, preventing his running his mill, and causing damage to his lands; that the matters complained of are contrary to the provisions of R.S.O. 1897, ch. 142; and that the defendants by their dam penned back the waters of the creek and prevented the free and uninterrupted flow thereof to the plaintiff's mill, whereby he was at various times unable to operate the same. The plaintiff claims damages and an injunction restraining the defendants from polluting this stream and penning back the waters thereof, and asks for a declaration of his right to the waters of the said stream.

The defendants deny the plaintiff's right and deny his possession and occupation of the land and of the flow of the said stream, as alleged in the statement of claim. The defendants further set up that in the year 1854 the lands now claimed by the plaintiff and owned by the defendants were vested in the Crown, and the Crown granted to the defendants' predecessor in title lots 7, 8, and 9 in the 2nd concession of Grattan, together with all the water powers thereon, with the right or easement to dam, divert, enjoy, and otherwise use the waters of the Constant creek for mill purposes as they saw fit, and in and prior to the grant imposed upon the grantees the duty to erect, maintain, and operate on the said lands a grist-mill and saw-mill. And they allege that, before the said grant and continuously since the same, the defendants and their predecessors in title maintained and operated the mills as they were bound to do and as they acquired the right to do by virtue of their said grant, and in enjoying the said lands and in operating the said mills they have for more than thirty years prior to the commencement of this action dammed, diverted, enjoyed, and otherwise used the water of the said creek as of right. The defendants further say that, at the time complained of, the defendants were and are now possessed of mills on the said lands the occupiers whereof for more than forty years before this action enjoyed, as of right and without interruption, the right of damming and diverting or using the water of the said stream and the working of the said mills, and the acts complained of were a user by the defendants of the said right. The defendants further allege that they are entitled to dam, divert, and enjoy or otherwise use the waters of the said creek, by virtue of their natural rights as riparian owners, by virtue of the rights expressly and impliedly granted to their predecessors in title by Crown grant in or about the year 1854, and by prescriptive right at common law and by prescriptive right under the provisions of R.S.O. 1897, ch. 133; and, by reason of their rights and easements so acquired, deny that the plaintiff has any cause of action, and say that his action is barred. They further deny that they have committed a breach of the provisions of R.S.O. 1897, ch. 142, and say that, if they have, the plaintiff has no cause of action in respect thereof. The defendants further deny the right and jurisdiction of this Court to try the matters in issue.

The grant to Duncan Ferguson, the defendants' predecessor in title, of lots Nos. 7, 8, and 9 in the 2nd concession of Grattan, is dated the 8th June, 1859, and contains no special grant in respect of the water power or the building of the mill, and expressly reserves to the Crown "the free uses, passage, and enjoyment of, in, over, and upon all navigable waters that shall or may be hereafter found on or under or be flowing through or upon any part of the said parcel or tract of land hereby granted as aforesaid."

It would appear, from the papers put in from the Crown Lands Department, that on the 14th June, 1854, a petition was presented

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to the Lieutenant-Governor in Council by the United Townships of Bromley and Wilberforce, in the County of Renfrew, setting forth that the inhabitants of these townships and of Grattan had experienced great inconvenience from the want of a supply of sawn lumber for building purposes, and stating that, "If your Excellency and Honourable Council will grant this gentleman, Duncan Ferguson, Esq., the right to purchase 300 acres of land in the newly surveyed township of Grattan, he will build a saw-mill, and in the course of a short time other mills, which would increase the value of the lands for miles around the locality in which they would be placed, and relieve your memorialists and the inhabitants of the township of Grattan from loss and inconvenience," etc.

This was followed by a further memorial from the Municipal Council of the Township of Admaston, in the County of Renfrew, to the same effect.

A copy of a report of a committee of the Executive Council, dated the 3rd June, 1858, and approved by the Governor in Council on the following day, sets forth that the lots in question were sold as a mill-site under an order in council on the 3rd July, 1854, subject to the building of a saw-mill and a grist-mill, and that it appears that the necessary dams and a first-class saw-mill had been erected, while the materials were on the ground for a grist-mill. Under these circumstances, he recommends that the patent be allowed to issue, in the anticipation of the complete fulfilment of the conditions of sale, upon payment of the purchase-money in full.

Since the argument, the report of the case of *Wyatt* v. *Attorney-General of Quebec*, [1911] A.C. 489, has come to hand. That was an appeal from the judgment of the Supreme Court of Canada. It was there contended that the letters patent should be construed having regard to the correspondence and course of dealing between the parties and the Government relating to the grant. The judgment of the Judicial Committee was delivered by Lord Macnaghten. He repeats the closing words of the judgment delivered by Girouard, J.: "'Summarised,' says the learned Judge, 'our holdings are:—That the patent issued by the Crown is plain and unambiguous in its language; that the rights of the parties must be determined by it, and cannot be added to, altered, or diminished by any previous negotiations written or oral leading up to its issue; that therefore the application of the patentee and subsequent correspondence between him and the Crown officials should not have been received in evidence for the purpose of explaining the patent, and, if looked at for the purpose of establishing an independent or collateral contract conferring additional rights upon the patentee, entirely failed to do so; that the legal effect of the language of the patent with respect to the bed of the river and the fishing rights therein depends upon the deter-

mination of the question whether the Moisie at and in the four or five of its miles covered by the patent is navigable or floatable within the meaning of the law of Quebec, and that, adopting the test of navigability laid down by the Privy Council . . . we concur with the findings of the trial Judge, and which findings are not questioned in the judgment of the Court of Appeal, that such river at such locality and from thence to its mouth is so navigable and floatable.'"

The effect of this decision upon the present case is, I think, to limit the defendants' right to the terms of the patent, which cannot be enlarged by the correspondence relating to the grant above referred to.

The trial Judge found in favour of the plaintiff for $200 and costs, and granted an injunction restraining the defendants from discharging refuse into the creek to the injury of the plaintiff; the order to be suspended for four months to enable the defendants so to alter their mill that no additional damage may be done.

The right by prescription claimed in this case under the Limitations Act, 1910, 10 Edw. VII. ch. 34, sec. 35* (R.S.O. 1897, ch. 133, sec. 35), is inchoate till action brought, and the user must be continuous and of right. "The periods mentioned in the Act" (corresponding to our statute) "are periods next before some action wherein the claim or matter to which such period relates is brought into question. Consequently, although the Act apparently renders the right indefeasible after twenty years' user, the combined operation of these two provisions renders it necessary for a person seeking to establish a prescriptive claim under the statute to prove uninterrupted enjoyment for a period of twenty years immediately previous to and terminating in some action or suit in which the right is called into question:" Halsbury's Laws of England, vol. 11, p. 272, sec. 542, where the authorities are collected—*Hyman* v. *Van den Bergh*, [1908] 1 Ch. 167 (C.A.); *Parker* v. *Mitchell* (1840), 11 A. & E. 788; *Wright* v. *Williams* (1836), 1 M. & W. 77; *Richards* v. *Fry* (1838), 7 A. & E. 698; *Ward* v. *Robins* (1846), 15 M. & W. 237, 242. "The period is not neces-

*The Ontario Limitations Act, sec. 35, ch. 34, 10 Edw. VII. (Ont.), 1910, is as follows:—

No claim which may lawfully be made at the common law, by custom, prescription or grant, to any way or other easement, or to any water-course, or the use of any water to be enjoyed, or derived upon, over, or from any land or water of the Crown or being the property of any person, when such way or other matter as herein last before mentioned has been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years shall be defeated or destroyed by shewing only that such way or other matter was first enjoyed at any time (prior to the period of twenty years) but nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned has been so enjoyed for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it appears that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing: R.S.O. 1897, ch. 133, sec. 35.

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sarily the period before the pending action; it may be the period before any action in which the right was brought into question:" *Cooper* v. *Hubbuck* (1862), 12 C.B.N.S. 456.

There is no doubt that the defendants and their predecessors in title have used their saw-mill since it was erected in 1854. At that time it was a comparatively small mill. It does not appear clearly when the various improvements that now exist were made. The trial Judge thinks it fair to assume that the evolution from the one saw of 1855 to the present complex condition has been gradual, and that the property of the plaintiff was not materially affected to his prejudice until 1895 or 1896.

In 1896, the defendants paid to the plaintiff $100, and subsequent thereto, down to the year 1903, paid the sum of $10. The plaintiff contends that these payments are a complete answer to the defendants' claim to a prescriptive right. It, therefore, becomes important to ascertain, with as much accuracy as possible, precisely what these payments were for.

At p. 49 of the evidence, one of the defendants says:—

"Q. Coming down to 1896, you made some arrangement with Mr. Hunter senior, at that time? A. Yes.

"Q. You paid him some money? A. Yes.

"Q. How much? A. $100.

"Q. What was that for? A. For saw-dust that went down on to his beaver meadow.

"Q. How did it come to get there that year? A. His dam, part of his dam, broke away, and the saw-dust that was lodged above his dam went down over his meadow, and I paid him $100 for it.

"Q. Did you make any arrangement for the succeeding years? A. Yes; he said he would put all the mill-refuse and flood-wood that went down the river through past him for $10 a year.

"Q. And that continued until what year? A. Until 1903, until I put up my burner.

"Q. You paid him that $10 a year each year? A. Yes.

. . . . .

"Q. Since 1903, what have you done with your saw-dust? A. I have been burning it principally.

"Q. Did you erect a modern burner? A. Yes.

"Q. And it is supposed to take care of all the saw-dust? A. Yes.

"Q. What became of the refuse generally around the mill, the other refuse besides the saw-dust? A. It went into the burner.

"Q. Since 1903? A. Yes."

On the 3rd June, 1908, the defendants sent their men to remove the refuse from the plaintiff's meadow, and made a memorandum of it in the following words: "Sent John Creighton and young Francois down to pick off our mill-refuse off William Hunter's meadow, but he refused to let the men go on to pick it off.

He had sent up word with Creighton on Thursday May 28th, '08, for me to send down men to take it off."

"Q. If it was not damaging him, why did you send men down to take it off? A. Because he asked me to.

"Q. But because he was a neighbour? A. Yes; it makes a big difference.

"Q. And it was not doing him any damage, of course? A. Well, if it was on his meadow where the hay was growing, it certainly would do him damage.

"Q. I should think it would have been fair enough to have said that long ago? A. The point I contend was that I paid him for that meadow, and for all the damage that was done to it, and if hay was grown since he has got the benefit of it.

"Q. You paid him in 1906, and this was in 1908. You did not get a deed of the meadow? A. I didn't want a deed.

"Q. But that is how you fix your conscience to the point of saying you have done him no damage, because in 1906 you paid him too much. A. I consider that I paid him for all the damage I had done to his meadow.

"Q. Or could do afterwards? A. Yes, because he claimed the meadow was useless to him.

"Q. And that is the reason that you now say you have not done any damage to his meadow? A. Yes.

"Q. It is not by reason of the fact that you have not put down stuff on it? A. I put a little stuff down on it, I will admit that.

"Q. But you say you ought not to pay him for it, because you paid him $100 in '96? A. Yes.

"Q. Did you take a receipt for that? A. I placed it to my credit in my books.

"Q. Have you got the entry? A. I will have to go out in the hall for it. My ledgers are in the hall.

"Q. We will wait for you. A. 'By damage done to meadow $100'—1906 or 1904—no, I beg your pardon, 1906.

"Q. You mean 1896? A. 1896, I beg your pardon.

"Q. What date? A. In the spring of the year he was getting lumber right along, and there was a little contention about what we would have to pay him, and we left it open until we balanced up in the fall, and I placed it to his credit then.

"Q. You allowed him $100 in the fall? A. Yes."

He is then asked as to the quantity of saw-dust that went down upon the meadow:—

"Q. A hundred dollars' worth? A. It was the meadow that was the hundred dollars. It wasn't the saw-dust was a hundred dollars. It was the damage I done the meadow that I paid the hundred dollars for.

"Q. Well it did damage that cost you $100, the saw-dust that went out? A. Yes."

I think the plain meaning of what took place is, that, the plaintiff complaining of the injury to his property by reason of

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saw-dust and other refuse being permitted to pass into the stream, the defendants paid $100 in 1896 for the damage so occasioned, and paid $10 a year thereafter until 1903, when they erected their burner in order to destroy the refuse of the mill and prevent it from going into the stream. This, in my opinion, operated as an interruption to the prescriptive right.

In *Gardner* v. *Hodgson's Kingston Brewery Co.*, [1903] A.C. 229, it was held that, where for more than 40 years without interruption the owner of a house used a cart-way from his stables through the yard of an adjoining inn to the public road, paying each year 15s. to the owners of the inn-yard, the inference of fact from the evidence was, that the payment was made for leave to use the way, and that there had been no enjoyment of right within the Prescription Act, and that there was no ground for presuming a lost grant. Halsbury, L.C., says, at p. 231: "One of the most common modes of preventing such a user growing into a right is to insist upon a small periodical payment, and if such evidence as we have here were permitted to be evidence of a right, not only to the user upon terms of payment, but of a right to make the payment and continue the user in perpetuity, it would be a very formidable innovation indeed. Those who drafted the Prescription Act knew well what they were about when, in dealing with the consequences which have to follow from long-continued user, they used the words 'as of right.'" Lord Macnaghten says, at p. 234: "Can a person who uses a way across his neighbour's land, and pays for the use of it year by year, be said to use the way 'as of right'? Again, I think every layman and most lawyers would answer, 'Certainly not.' If the way in question has not been used 'as of right,' there is nothing to attract the provisions of the Prescription Act. The case of the appellant, so far as it is founded on that Act, must fail. It was for the plaintiff to make out her case. If she cannot shew that the user of the way was 'as of right,' the essential condition of success is wanting." And, at p. 235, he further says: "The suggestion of a lost grant burdening the respondents' property with a servitude which would so greatly diminish its value, and charging the appellant's property with a rent-charge in perpetuity, is, I think, out of the question. It seems to me a most unlikely hypothesis. But it is enough to say that, apparently, no trace of such an arrangement can be found in any of the deeds of either party, and that nothing is known of the circumstances which existed when the premises, which now belong to the appellant, and the premises which now belong to the respondents, if they ever formed one property, became separated. There is certainly no need to resort to the presumption of a lost grant when the facts of the case, so far as they are known, suggest a much simpler and a more natural explanation."

In the present case, it seems to me idle to argue in favour of a lost grant. In the case of *Angus* v. *Dalton* (1877-8), 3 Q.B.D. 85,

4 Q.B.D. 162, and *Dalton* v. *Angus* (1881), 6 App. Cas. 740, the origin and effect of the doctrine of a lost grant was much discussed. The case is referred to in Goddard's Law of Easements, 7th ed., pp. 176 to 182. The author points out the difficulty to extract from the judgments and various opinions of the Judges any certain rule or principle of law. The learned author says, at p. 172: "It is not in every case where there has been user or enjoyment for the requisite period that the doctrine of presumption of lost grant can be applied. The doctrine can only be applied to easements which could, if the evidence were sufficient, be claimed by prescription at common law, and the expedient of presuming a lost grant is only applicable to cases where the evidence or some technicality prevents the application of the principle of prescription at common law, to which only it is ancillary." He further points out: "If a right is claimed under the lost grant doctrine, the question arises whether evidence is admissible on behalf of the party interested in defeating the presumption, either to prove positively as a fact that no grant ever was made, or to shew circumstances from which its non-existence may reasonably be inferred."

There appears to be no actual decision on this point. The result of the authorities, according to the view of the learned author, is, that, if the evidence of user is not satisfactory, though uncontradicted, or if evidence to rebut this presumption is given, it is open to the Court or jury to find the fact or not according to conviction. This point was fully discussed in *Angus* v. *Dalton*.

In our own Courts, in *Re Cockburn* (1896), 27 O.R. 450, it was held that, where twenty years of open and uninterrupted user is proved, the jury may and ought to presume a lost grant.

The implication of a lost grant does not arise to do an act forbidden by the law: *Rochdale Canal Co.* v. *Radcliffe* (1852), 18 Q.B. 287; *Neaverson* v. *Peterborough Rural District Council*, [1902] 1 Ch. 557 (C.A.) "In inferring a legal origin for such user, it (the Court) cannot infer one which would involve illegality:" *per* Collins, M.R., at p. 573.

It is laid down by Gale, Easements, 8th ed., pp. 194, 195, 197, that evidence is admissible to rebut the presumption, but the views of Judges differ as to what evidence is sufficient for that purpose. Although the doctrine of lost grant received a severe shock in *Angus* v. *Dalton*, it has not been put an end to by the statute: *Leconfield* v. *Lonsdale* (1870), L.R. 5 C.P. 657, 726; Gale, p. 199. No grant can be implied unless such implication is rendered reasonable by the surrounding circumstances or the act of the parties: Goddard, 7th ed., p. 127.

In *Rangeley* v. *Midland R.W. Co.* (1868), L.R. 3 Ch. 306, 310, Lord Cairns says: "Every easement has its origin in a grant expressed or implied. The person who can make that grant must be the owner of the land. A railway company cannot grant

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an easement over the land of another person. They may grant an easement as soon as they become the proprietors of the land but not until they become such proprietors. They must own the servient tenement in order to give an easement over the servient tenement." See *London and North Western R.W. Co.* v. *Evans*, [1892] 2 Ch. 432.

A grant cannot be presumed if an actual grant would have been void by reason of an Act of Parliament: *Mill* v. *Commissioner of New Forest* (1856), 18 C.B. 60. It is sufficient to prevent the acquisition of a prescriptive right that the grant would have been at variance with the purpose of the Act: Goddard, p. 243; *Rochdale Canal Co.* v. *Radcliffe*, 18 Q.B. 287. In deciding the question of a lost grant, all the surrounding circumstances must be taken into consideration: *Birmingham Dudley and District Banking Co.* v. *Ross* (1888), 38 Ch.D. 295.

We have the grant itself, and no such right as is claimed is given. It is true that the defendants' predecessor in title was permitted to purchase the land upon which his mill was afterwards erected, upon the understanding that he should build a saw-mill; but this does not, in my opinion, raise the presumption of an implied grant to foul the stream.

The case of *Attorney-General* v. *Harrison*, 12 Gr. 466, was decided in the year 1866, and prior to any legislation, so far as I can find, restricting the right of putting saw-dust in streams in navigable waters. In that case, the Crown, in making sale of a lot of land situate upon a navigable stream, stipulated that the purchaser should erect on the property a saw-mill, as well as a grist-mill; and it was there held that "this did not warrant the purchaser in creating a nuisance in the river by throwing into the water the saw-dust and refuse of his saw-mill, the effect of which was to create obstructions in the river to such an extent as to injure or impede the free use of the river by vessels navigating the same." The case was tried before Spragge, V.-C., who gave a considered judgment. At p. 470, he says: "The rights of the public in navigable waters are correlative with those of a riparian proprietor, nor is it any answer or any justification in either case that the injury is not very great, or that it is compensated by some public benefits. It is said in this case that the defendant's mill is a public benefit, and in proof of its being so . . . the defendant's counsel point to the fact that in making the sale of the mill-site by the Government it was made a condition that the purchaser should erect as well a saw-mill as a grist-mill thereon. But in *Rex* v. *Ward* (1836), 4 A. & E. 384, it was held, that if an erection in a navigable river be in fact a nuisance it is no answer to say that a resulting public benefit has counterbalanced the nuisance." And again, at p. 473: "The defendants make a more serious point of this, that by the conditions of sale (to which I have referred) they were bound to put up a saw-mill; that it is

in the ordinary practice, in saw-mills worked by water, for the saw-dust to be allowed to drop into the stream, and that this being done must have been contemplated by the Government when the sale was made. That, however, can amount to no more than this, that the obligation to erect a saw-mill imposed by the Crown, carried with it an implied license to drop saw-dust into the river. This position is open to more than one answer. One is that the Crown cannot grant a license to commit a public nuisance. It would be licensing an individual to do that which interferes with a right which is the common inheritance of the people. Another is, that such a license is not to be implied; it would be derogating from the honour of the Crown to assume an intention to do that which would be injurious to the people; and it would be assuming ignorance on the part of the Crown of its own powers and of the rights of the subject." And again, at p. 472: "The defendants say that they have been in the habit for a number of years of allowing their saw-dust to float down the river without any objection being made to it. There is clearly nothing in this; for no length of time will legitimize a public nuisance, the soil being in the Crown, and the user the common inheritance of the public at large."

We have in clear evidence the original grant and the subsequent user. By the first the land is alone granted; as to the second, in my opinion, there has been an interruption of the alleged user preventing any prescriptive right from arising. I think it may fairly be said, upon the evidence, that the user was at all times contentious, was objected to, and these objections were afterwards recognised as valid by the payments that were made, and by making provision to burn the refuse. See *Burrows* v. *Lang*, [1901] 2 Ch. 502, 510; Goddard, 7th ed., p. 258.

Mr. Tilley strongly urged that the payment of the $100 and the $10 was for injury done over and above the prescriptive title. It is, I think, a sufficient answer to that position to say that no such claim was made at the time of payment; no suggestion was made that a limited prescriptive right was claimed or that the payment was for the excess.

There is a further difficulty in the plaintiff's way. The learned trial Judge has found that, prior to 1896, the injury to the plaintiff was comparatively trifling. It was owing to the increased capacity of the mill that the injury has been done. There could, therefore, be no right prior to 1896, either by prescription or lost grant, to justify the user of the mill as it has been used since that date.

In *Crossley and Sons Limited* v. *Lightowler* (1867), L.R. 2 Ch. 478, 481, Lord Chelmsford, L.C., decided that a prescriptive right having been acquired to pour foul water into a stream, and the fouling having been increased by the erection of new factories in the place of those to which the right was attached, "the user which originated the right must also be its measure, and it cannot be enlarged to the prejudice of any other person."

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In *Goldsmid* v. *Tunbridge Wells Improvement Commissioners* (1865), L.R. 1 Eq. 161, the Master of the Rolls expresses his opinion (p. 169) that, "when the pollution is increasing, and gradually increasing, from time to time, by the additional quantity of sewage poured into a stream, the persons who allow the polluted matter to flow into the stream are not at liberty to claim any right or prescription." But in *Attorney-General* v. *Acton Local Board* (1882), 22 Ch.D. 221, which is a similar case, Fry, J., treated the prescriptive right claimed, not as a right belonging to the inhabitants of Acton as a class, but as an individual right belonging to the older occupants of houses; so that any occupant whose house had drained into the stream for twenty years would have a right to continue to drain into it. Goddard, referring to these cases, takes the view that, if the pollution, at its commencement, or twenty years before the action, was defined in amount, and originated from a cause certain, as a factory or any definite number of houses, a prescriptive right may be acquired, and the measure of the right will be the extent of pollution at the commencement of the user, or at the beginning of the twenty years, but otherwise it is doubtful if any right can be gained.

In considering a case of this kind, it should not be forgotten that it is a well-established rule of law that every land-owner has a natural right, that the water of a natural stream which passes over his land shall be suffered to continue in its natural state, that is, not only that it shall be uninterrupted in its course, but also that it shall be suffered to continue in its naturally pure condition. The leading case for this principle is *Wood* v. *Waud* (1849), 3 Ex. 748. See Goddard, p. 105.

In *Wood* v. *Waud*, it was proved that many other manufacturers poured filthy water into the stream, so that the damage caused by the defendants was imperceptible; but it was held that the plaintiffs had received damage in point of law, for they had a right to the natural stream flowing through their land in its natural state as an incident to the property in the land through which the watercourse flowed, and the right continued, notwithstanding the pollution from other causes. See Goddard, p. 106.

It is here necessary to inquire whether the Navigable Waters' Protection Act, R.S.C. 1906, ch. 115, sec. 19, creates a prohibition of the defendants fouling the stream in the present case. That section provides that "no owner or tenant of any saw-mill, or any workman therein or other person, shall throw or cause to be thrown, or suffer or permit to be thrown any saw-dust, edgings, slabs, bark or rubbish of any description whatsoever into any river, stream or other water, any part of which is navigable or which flows into any navigable water." That section is, I think, applicable to the present case. It would appear to have been originally introduced in modified form by 36 Vict. ch. 65, sec. 1, and carried into the subsequent statutes: 49 Vict. ch. 36, sec. 7;

R.S.C. 1886, ch. 91, sec. 7. There was, I think, sufficient evidence to bring this case within the operation of the statute.

The principle that would apply is, that to foul a stream, being prohibited by Act of Parliament, is against public policy, and no prescriptive right could be obtained against the policy of the law; and the same principle applies to prevent the presumption of a lost grant arising in such a case.

In Halsbury's Laws of England, vol. 11, p. 267, sec. 533, it is said: "The Court will not presume a lost modern grant which, had it ever existed, would have been in contravention of the provisions of a public statute, or of a custom:" citing *Neaverson* v. *Peterborough Rural District Council*, [1902] 1 Ch. 557 (C.A.), *per* Collins, M.R., at p. 573; *Rochdale Canal Co.* v. *Radcliffe*, 18 Q.B. 287; *Clayton* v. *Corby* (1843), 5 Q.B. 415; *Goodman* v. *Saltash Corporation* (1882), 7 App. Cas. 633, 648.

In my opinion, the judgment of the trial Judge is right and ought to be affirmed and the appeal dismissed with costs.

MULOCK, C.J.:—I agree.

Mulock, C.J.

RIDDELL, J. (dissenting):—In and through the township of Grattan runs Constant creek, which, at the places in question in this action, furnishes two water powers—that up the stream being the defendants', with a dam affording a head of from 11½ to 14¾ feet; that down the stream, the stream flowing nearly due south, being the plaintiff's, with a dam affording a head of 8 ft. 7 in. to 11 ft. 7 in., the pond being 14¼ acres in extent. Below the plaintiff's dam is a beaver meadow, through which the stream flows, making in the meadow an angle, almost a right angle, to the right, down stream.

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The plaintiff has a mill upon his premises, badly out of repair, and not now in use: the defendants are running a saw-mill.

The complaint is that the defendants, during the years 1904 to 1909 inclusive, have polluted the stream by placing therein "saw-dust, bark, shingle edgings, roots, cull shingles, and other mill-refuse, thereby causing damage to the plaintiff's said mill-pond and water power, preventing him running his said mill and causing damage to his said land." A complaint is also made that the defendants penned back the water, etc.; but this is not pressed, having been found against at the trial.

The defendants claim: (1) that they have the right to do as they have done by virtue of a grant from the Crown; (2) prescriptive right by the common law; and (3) by statute R.S.O. 1897, ch. 133.

To determine the rights and position of the parties, it is necessary to look at the Crown Lands Department records—and this is proper: *Brady* v. *Sadler* (1890), 17 A.R. 365.

From the records of the Crown Lands Department, Toronto, it appears that a petition was presented to the then Governor-

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General, Lord Elgin, in 1854, alleging that the inhabitants of Grattan, Bromley, and Wilberforce suffered from want of sawn lumber, and that Duncan Ferguson, Esq., would erect a saw-mill if he was granted the right to buy 300 acres of land in Grattan—the petition asked that this be done. The Township of Admaston sent in an identical petition during the same month, June, 1854. Representations were made in August against the proposition; but in July, 1854, the Governor-General in Council approved of a report of the Commissioner of Crown Lands that the three lots be offered for sale at four shillings per acre, one-fourth down at the time of sale, the remainder in three annual instalments, on condition of the purchaser building a saw-mill within twelve months and a grist-mill within eighteen months from the date of sale, of a description suitable to the capacity of the mill-site. Accordingly, on the 20th July, 1854, a notice was given by the Crown Lands Department that lots Nos. 7, 8, and 9 in the 2nd concession of Grattan, 300 acres, would be offered for sale by the resident agent at Renfrew on the 29th August. Conditions of sale: price as already mentioned; "the purchaser to build a saw-mill within twelve months and a grist-mill within eighteen months;" upset price four shillings per acre. Cameron and Ferguson bought, and gave security (Crown sale 12739).

In June, 1858, the Governor-General approved a report of a committee of the Executive Council approving a recommendation of the Commissioner of Crown Lands, which says: "The lots in question were sold as a mill-site under an order of council of the 30th July, 1854, subject to the building of a saw-mill and a grist-mill, and that it appears by the evidence filed that the necessary dams have been erected and a first-class saw-mill, while the materials are on the ground for a grist-mill. Under these circumstances, he recommends that the patent be allowed to issue, in anticipation of the complete fulfilment of the conditions of sale, upon payment of the purchase-money in full."

In 1859, the balance of the purchase-money was paid; Cameron had in 1856 conveyed all his rights in the three lots to Ferguson; and on the 3rd June, 1859, a patent issued to Ferguson of the three lots.

By thus issuing the patent without enforcing the condition that a grist-mill should be built, as it is said was done, the condition was simply changed into a contract which the Crown might enforce at pleasure or abandon if that course was for any reason thought advisable: *Behn* v. *Burness* (1863), 3 B. & S. 751 (Cam. Scacc.); *New Hamburg Manufacturing Co.* v. *Webb* (1911), 23 O.L.R. 44. But the land was sold as for a water power and to run a saw-mill and a grist-mill—of this there can be no shadow of doubt. There can be as little doubt that the grant of land, under these circumstances, carried with it the right to occupy and use the land and the stream, in the manner contemplated, for a

saw-mill and grist-mill—and further that there was an obligation enforceable by the Crown that the property should be so used. And it is not at all necessary that the obligation or right should appear in the deed.

In *Robinson* v. *Grave* (1872), 27 L.T.N.S. 648, Wickens, V.-C., says, in the case of a grant made for the purpose of the grantee building, that when the grant does not notice the intention of building, but both grantor and grantee know that the purpose is building, an equitable right is obtained co-extensive with the legal right which would have been obtained if the grant had noticed the intention of building. In that case the building was put up between contract and conveyance, just as in this the saw-mill was put up between contract and grant.

I do not cite other cases, though they are not few—the question is not, what does the grant contain? but, what did the parties contemplate at the time of the contract and deed?

If the grantee has covenanted or contracted to do a certain act or carry on a certain trade, etc., the case is, if anything, even *à fortiori*: *Siddons* v. *Short* (1877), 2 C.P.D. 572. And it can make no difference that the contract appears in the conveyance of the land, or, as here, in conditions of sale accepted by the vendee. It is not contended that a grantee from the Crown stands in any other position than a grantee from a private individual.

"No strained or extravagant construction is to be made in favour of the King . . . royal grants are to receive a fair and liberal interpretation . . . :" Chitty, Prerogative of the Crown (1820), p. 393. "If the King's grants are upon a valuable consideration, they shall be construed strictly for the patentee for the honour of the King:" *ib.*, p. 394. When an owner of land sells a portion thereof for a particular purpose, he cannot derogate from his own grant—this is plain equity. "He is bound to abstain from doing anything on the remaining portion which would render the demised (or sold) premises unfit for carrying on such business in the way in which it is ordinarily carried on . . . :" Stirling, J., in *Aldin* v. *Latimer Clark Muirhead & Co.*, [1894] 2 Ch. 437, at p. 444.

In other words, the purchaser who buys to carry on a particular business has an easement over all the remaining land of his vendor, so far as to entitle him to carry on that business in the ordinary way—the vendor cannot derogate from his own grant. "The principle that a man may not derogate from his own grant is one of considerable importance with regard to easements, for it frequently happens that it would be an act in derogation of a grant to stop the user of an easement which has not in fact been granted to one who claims it" (Goddard on Easements, 7th ed., p. 139); "and as the law will not allow a land-owner to prevent that enjoyment, an easement is thus practically acquired, although no ex-

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Argument

N. B. R. Co., 29 N.B.R. 588; MacMurchy and Denison, Law of Railways in Canada, 2nd ed. pp. 513, 514.

[BARKER, C.J.:—If this a continuing trespass the plaintiffs could get an injunction to stop the railway.]

Taylor:—There are no damages for the first year of the trespass because the plaintiffs had only an equitable interest in this property. They did not get their deed until 1906. Section 306 of the Railway Act provides that no suit or action shall be brought for injury or damage caused by reason of construction or operation of a railway, unless brought within one year after the cause of action accrued. Section 42 of 27 Viet. ch. 57 makes a limitation of six months. These sidings were built in 1892.

Currey, K.C. (*J. M. McIntyre*, with him), for the plaintiff, *contra*:—What we say is that as to the main line we make no claim for trespass because the railway had acquired title by possession, but we say they had no title to the land occupied by the sidings. We admit they had a right to take six rods under the Act 27 Viet. ch. 57, but in order to do this, they were bound to pay compensation, which they have not done. There is no presumption as to the possession of the six rods.

[LANDRY, J.:—When they take possession for the purpose of the railway, did they not in law take possession of all that the law allowed them to take?]

Currey, K.C.:—Not unless they followed the provisions of the Act. As to the limit of time for bringing the action, in the Act incorporating the Woodstock Railway Company, the section applies only to something done under the Act, and does not apply to an act of trespass.

[MCLEOD, J.:—The Act 27 Viet. ch. 57 appears to authorize the company to take and hold the six rods but it is always subject to the condition that they pay for it.]

Currey, K.C.:—That is what we contend and we say that payment is a condition precedent.

In order to get to the plaintiff's residence we had to cross the two side tracks and we were often delayed a long time in getting to the highway. As to our right to recover for more than one year's damages, defendant's counsel did not cite sec. 306, sub-sec. 4, which expressly excludes the limitation.

[BARKER, C.J.:—I understand your contention is that the Woodstock Railway Company would have the right, under the Act, to take and hold the land to the extent of the six rods, but before title vested in them they must take the steps pointed out by the Act to ascertain the value and pay for it.]

Currey, K.C.:—That is our contention. We were in possession. We proved a documentary title. The company pleaded title in themselves, but they failed to prove any title under the statutes or by deed.

F. R. Taylor, in reply.

The judgment of the Court was delivered by

Barker, C.J.

BARKER, C.J.:—This is an action of trespass tried before White, J., with a jury, in which the Judge, on answer to questions submitted to the jury, entered a verdict for $1,200.

It seems that the defendants in 1892 entered upon a piece of land adjoining their track and laid two sidings which have been used ever since in connection with the operation of their road in or about Woodstock. The plaintiffs claim that they were not only the owners of the land in question but that they were in actual possession of it when the entry was made and continued so ever since. They claim that the use and occupation of these sidings cause great inconvenience to the occupants of the residence on the property of which the land in question is a part and materially decreases its value. The land in question is a part of property in Woodstock spoken of by the witnesses as the "Bull homestead." It seems to have been in the possession of these plaintiffs, who are the children of Augustus Bull, and of him and his father, for a great many years. Mrs. Ketchum speaks of her father, George Bull, being in possession of it and occupying the house seventy years ago. In 1871, the railway at this point was built, and the company which constructed it seems to have laid their main track on a strip of this Bull property, some fourteen feet wide, which has ever since been used and occupied by the railway which for the time being was operating the line.

So far as there is any evidence on the point, it is not known how or under what circumstances this strip of land was taken. There is no record of it of any kind; there are no fences or anything else, beyond the usual ditches on the side of the track, to define the limits of the taking or of the occupation, and there is nothing to suggest that any proceedings were ever taken to assess the damages for expropriating the land, or that anything was ever paid for it. The plaintiffs, I understand, make no claim to this strip—fourteen feet in width—upon which the main track is laid, the railway having acquired a prescriptive title by possession. There seemed to be some uncertainty at the trial as to the company which actually built this track and took the land for the purpose. It appears to have been claimed by the defendants' counsel that it was built by the Woodstock Railway

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Company. Mrs. Ketchum's evidence supports that view, and for the purposes of this case I shall assume that to be correct.

The defendants claim as a justification for their entry and laying down the two sidings and their subsequent use of the property in question for the purpose of the railway, that by virtue of certain agreements and assignments, ratified in some, if not all cases by statute, they are the owners or lessees of what was the Woodstock Railway and the company's title to the land acquired by it for the purpose of the railway. It seems that this railway company went through a series of mergers with other companies previous to the defendants' getting it as a part of their system, which it was conceded had been brought about previous to their entry on the land in 1892. To render this defence of any value, the defendants must shew in some way that the Woodstock Railway Company had some title or interest or right to the land in question by which the defendants could succeed. To do this we are asked as a matter of law to presume that when the Woodstock Railway Company in 1871 took possession of the fourteen foot strip and placed their main track upon it, they took possession of the whole 99 feet in width to which they were restricted in exercising their right of expropriation. The sidings were within the 99 feet. It was also contended that the land taken in 1871 was taken and held under and by virtue of the authority given the Woodstock Railway Company by its charter—the legal effect of which was to vest in that company the fee and right of possession in the property and not merely an easement as the learned Judge instructed the jury. Add to this the presumption we are asked to make and the absolute title in the whole 99 feet had vested in the defendants previous to their entry in 1892. This is in fact the whole defence set up here by way of a justification for the trespass complained of. I quite agree with the learned Judge in declining to make any such presumption.

The Woodstock Railway Company was incorporated in 1864 (27 Vict. ch. 57), for a construction of a railroad from Woodstock to connect with the Saint Andrew's and Quebec Railway Company. It was given the usual powers of taking and holding land not only for preliminary surveys and location but also for permanent way; the land to be taken was not to be more than six rods in width. Provision was made for the assessment of the damages in the event of the parties not agreeing, and a procedure provided for their recovery. Whether as a result of the provisions of that Act the company would on expropriation take the fee in the land or merely an easement or right-of-way is a question upon which I express no opinion; nor is any necessary in this case. If the defendants' position were correct, it would not alter their title to the property now in dispute for it was

never taken or held. In addition to this there was an Act, passed also in 1864, providing for subsidies to various railways, among others to the Woodstock Railway (27 Vict. ch. 3). In 1865, that Act was added to (28 Vict. ch. 12). By this additional Act it was provided that companies entering into an agreement for the construction of any of the subsidized lines mentioned in the Act of 1864 should have specified rights of expropriation, practically the same as in the Woodstock Railway Company Act, with a proviso (in sec. 2) that, "the land so taken by the said company" (that is, the company entering into the agreement for the subsidy), "or body corporate shall be held as lands taken and appropriated for highways," that is an easement or right of way, so that in the case of abandonment the title would revert to the original owner. It is said, and I think with every likelihood of the remark being accurate, that the Woodstock Railway Company had this subsidy, in which case the learned Judge's statement was correct. In my opinion the defence entirely fails as against the plaintiffs' title and possession. I desire to add that the defendants do not set up or pretend to put forward that in what they did, and which are the trespasses complained of, they were themselves initiating any expropriation proceedings. They did not profess to be exercising any power for any such purpose which they had either by the acquisition of this railway or which they themselves had under their own private statutes or any public general Act. They relied solely upon a title or right to an easement or whatever it may be called acquired by the Woodstock Railway Company and vested in them as their successors or assignees.

I think the verdict was rightly entered for the $1,200. The limitation of one year provided by sec. 306 of the Railway Act, R.S.C. 1906, ch. 37, does not, I think, govern this action. A trespass such as this cannot be considered as an injury or damage sustained by reason of the construction or operation of the defendants' railway; but if it could, then the damage has been continuous, as the jury found. The plaintiffs are, therefore, entitled to the $1,200, the damages assessed for the six years immediately preceding the bringing of this action.

I have not noticed some objections taken to the admissibility of some of the conveyances, for it is clear that if the objections can be sustained the defendants' entry was unlawful as against the plaintiffs' possession.

Appeal dismissed with costs.

ONT.

C. A.
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June 28.

SMITH v. HAMILTON BRIDGE WORKS CO.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. June 28, 1912.

1. MASTER AND SERVANT (§ II B—173)—COMPLIANCE WITH COMMANDS OF FOREMAN—DANGEROUS MACHINERY—INSUFFICIENT HOOKS.

Negligence on the part of an employer resulting in injury to one of his employees is shewn where it appears that his foreman, while men under him were engaged in moving across the floor of the master's works a heavy iron beam with hooks large and adequate enough to carry the beam, ordered the men to use smaller hooks because the larger hooks, on account of their length, would not lift the beam over a pile of iron stringers on the floor, and where it was proved that the smaller hooks were insufficient for the purpose and permitted the beam to fall, injuring one of the men engaged in the work of moving it.

[*Smith v. Hamilton Bridge Works Co.*, 3 O.W.N. 177, 20 O.W.R. 227, affirmed on appeal.]

Statement

APPEAL by the defendants from the judgment of a Divisional Court, 3 O.W.N. 177, 20 O.W.R. 227, reversing the judgment of the trial Judge, upon the facts, and directing judgment to be entered for the plaintiff for $1,500 with costs.

The action had been tried, by consent of the parties, before His Honour Judge Snider, Local Judge at Hamilton, and judgment had been entered by him for the defendants. The learned trial Judge found that there was no actionable negligence, but in view of a possible appeal, he assessed the damages in case the plaintiff should, upon appeal, be found entitled to recover, at the sum of $1,500.

The Divisional Court reversed Judge Snider's decision and ordered judgment for the plaintiff, and that judgment is affirmed by the present decision.

Wallace Nesbitt, K.C., for the defendants.

J. G. Farmer, K.C., and *M. Malone*, for the plaintiff.

Garrow, J.A.

The judgment of the Court was delivered by GARROW, J.A.:—The action was brought to recover damages caused to the plaintiff by an injury which he received on the 13th January, 1911, while in the employment of the defendants in their factory at the city of Hamilton.

On that day, the plaintiff, with other workmen, was engaged in moving an iron beam, weighing between 2 and 3 tons, when the hooks by which the beam was suspended slipped, and the beam fell on the plaintiff, and inflicted severe injuries, for which the Divisional Court has awarded him the sum of $1,500.

The negligence alleged was the slipping of a hook, which, it is said, was an improper hook, of insufficient grasp to use for the purpose, and that a larger hook, which was also in use in the factory, should have been used.

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The learned trial Judge was of the opinion that the hooks used were proper hooks; that they were made of proper material and were in good order; and that in strength, shape, and grasp they were sufficient for the work. And his impression as to the cause of the accident, although not stated as his conclusion, was, that the hooks had slipped, not from any defect in them, but because they had not been properly attached to the beam.

The Divisional Court was of the opinion that the hooks were insufficient in grasp; that the larger hooks should have been used; and that the insufficiency of the hooks, and not the mode of attaching them, was the cause of the beam falling.

The beam had been removed part of the way by means of the large hooks. When the pile of material on the floor over which the beam had to be lifted was reached, the foreman directed the men to use the smaller hooks, because the larger hooks, from their length, would not lift it over the pile; and the change was accordingly made. The plaintiff had been employed in the factory for nearly five years, and was familiar with the work, and also with the appliances. He says that the small hooks did not have a good grip, and the beam was too heavy for them. Although he had been engaged in hundreds of similar operations, he had never seen the small hooks used before for so heavy a beam. The large ones were always used, and no accident had ever occurred.

Evidence contradicting the plaintiff as to the use of the small hooks on similar work was given on behalf of the defendants; but, to my mind, it is not very convincing. It does not, for one thing, quite take away the effect of the practically undisputed circumstance that the large hook was considered the proper thing to use until the pile on the floor was reached, when it was found that it would be necessary to change to the smaller one in order to surmount it. And at least one of the witnesses called for the defendant (Mr. Louth) says that, in his opinion, the larger hook was the better one to use, because, as seems reasonable, it would take a better grip, and was, therefore, the safer of the two to have used on the occasion in question.

The point is, of course, a somewhat narrow one, depending upon the evidence, which has to be read with some care to make the necessary discrimination between what is fact and what is merely excuse or justification after the event. In doing so we are not hampered by any question of credibility, for all the witnesses examined were given credit for candour and impartiality by the learned trial Judge; and, after giving my best consideration, I am of the opinion that the Divisional Court arrived at the proper conclusion.

I would dismiss the appeal with costs.

Appeal dismissed.

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COOPER v. ANDERSON.

Manitoba King's Bench, Robson, J., in Chambers. February 23, 1912.
Manitoba Court of Appeal. March 19, 1912.

1. LIS PENDENS (§ II—10)—HOLDER OF TITLE—RIGHT TO HAVE LIS PENDENS VACATED—REAL PROPERTY ACT (MAN.) SECS. 71 AND 91.

Where the plaintiff, to whom a certificate of title was issued and land transferred as security for a debt from the grantor, gave his grantor a power of attorney, and afterwards alleged that the latter, as the result of a conspiracy, transferred the land, in trust for himself, to another, and that a certificate of title was issued to the transferee, who, in turn, transferred the land in fee simple to a trust company, without consideration, in trust for the grantor and others, who not a party to the alleged conspiracy, who acquired from the trust company an interest in the land under an agreement for its purchase, obtained under secs. 71 and 91 of the Real Property Act (Man.), a good title as against the plaintiff, since he secured it from its registered owner, and a *lis pendens* filed by the plaintiff will be vacated on motion of such contract purchaser in an action brought by the plaintiff to set aside all of such transfers.

2. VENDOR AND PURCHASER (§ III—35)—RIGHTS OF BONA FIDE PURCHASER FOR VALUE—REGISTERED OWNER—NOTICE OF EQUITIES—REAL PROPERTY ACT (MAN.) SEC. 91.

It is not necessary, under sec. 91 of the Real Property Act (Man.), for one who contracts with the registered owner of land for its purchase, to make inquiry as to the latter's title, and the former will be protected as an innocent purchaser, notwithstanding he acquired notice of another's equity in the property, before the completion of the contract of purchase.

3. VENDOR AND PURCHASER (§ III—35)—RIGHT OF PARTY PURCHASING LAND UNDER A CONTRACT—REAL PROPERTY ACT (MAN.) SEC. 91.

A contract for the purchase of land is within sec. 91 of the Real Property Act (Man.), notwithstanding such Act deals specifically with actual transfers, mortgages, encumbrances, and leases, since the words "contracting or dealing with, or proposing to take an instrument from a registered owner," which are used in such section, clearly comprehend contracts of purchase.

4. ESTOPPEL (§ III D—65)—GIVING POWER OF ATTORNEY TO DEAL WITH LAND—QUESTIONING TRANSFER FOR VALUE.

The giving, by one to whom a certificate of title was issued and the land transferred as security for a debt, to the grantor of a power of attorney to deal with the granted land estops the former from questioning a subsequent transfer for value by the grantor to a third person.

5. COURTS (§ II A 4—165)—JURISDICTION AS TO MATTERS OF TITLE—VACATION OF LIS PENDENS—MAN. KING'S BENCH RULES (1902), RULES 615, 616.

The Court may, on a motion by one defendant, whose interest was distinct and severable from the rest of the defendants, to vacate a *lis pendens* filed by the plaintiff in an action against several defendants, made as upon a motion for judgment upon admissions under Rule 615 of the Manitoba King's Bench Rules, 1902, render a final judgment dismissing the action as to such defendant without waiting to determine the matter as between the other parties.

[*Re Barker's Estate*, 10 Ch. D. 162, at 165, specially referred to; Holmested & Langton's Judicature Act, 3rd ed., 817.]

Statement

AN application by one of several defendants to vacate the registration of a certificate of *lis pendens*. On consent of all

parties the motion turned into a motion for judgment on the pleadings and admissions, in so far as the rights of the defendant applying are concerned.

Judgment was given dismissing the action against defendants, the Trust Investment Company.

W. M. Crighton, and *E. A. Cohen*, for plaintiff.
A. K. Dysart, for Anderson.
A. C. Galt, K.C., for the Trusts and Guarantee Company.
E. R. Levinson, for the Trust Investment Company.
H. F. Swift, for Wickson.

ROBSON, J.:—In this action plaintiff seeks to establish an interest in certain lands in Winnipeg. Robson, J.

The defendants are John Herbert Anderson, Walter Wickson, the Trusts & Guarantee Company, Limited, Annie Anderson, Agnes Anderson and the Trust Investment Company, Limited.

The matter comes up now upon an application by the Trust Investment Company, Limited, for an order vacating the registration of a certificate of *lis pendens*.

It was agreed by all parties that I should consider the pleadings and make such order thereupon as might seem proper in view of the contentions of the parties now to be mentioned.

The pleadings are lengthy. I will endeavour to epitomise them.

In his statement of claim plaintiff alleges that as security for a debt from J. H. Anderson to him the land was transferred to plaintiff and that he, plaintiff, received a certificate of title about 30th December, 1902; that on 28th April, 1905, plaintiff granted to Anderson power of attorney; that about 13th November, 1907, a conspiracy was formed between Anderson and defendant Wickson to transfer the lands to Wickson in trust for Anderson and that a certificate of title issued to Wickson on 13th November, 1907; that on 31st January, 1910, Wickson, at the request of Anderson, in furtherance of the fraud, transferred the land to the Trusts & Guarantee Company as trustee for Anderson and that on 4th April, 1910, that company was registered as owner in fee simple in possession, though in fact it holds the land in trust for the defendants Anderson, the defendants Annie Anderson and Agnes Anderson taking their supposed shares as a gift from J. H. Anderson; that the defendants the Trust Investment Company filed a caveat against the lands claiming to have purchased under an agreement from the Trusts & Guarantee Company. The charges of fraud are set forth very fully and with alternative aspects. The plaintiff claims that the transfer be set aside and certificate of title cancelled and a declaration that plaintiff is entitled to be registered as owner

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subject to any rights the Trust Investment Company may be declared by the Court to have. There are also demands for other relief not now important.

It will be observed that the Trust Investment Company is not involved in the charges made against the other defendants. Those defendants do not question the position of the Trust Investment Company. The only allegation by the plaintiff affecting that company is that it filed a caveat as purchaser under an agreement from the Trusts & Guarantee Co.

The prayer asks that the certificate of title be set aside. With it the caveat would go too, so the Trust Investment Company is concerned in the relief claimed, though no facts are alleged making out a cause of action against it. The statement of claim seems to assume that if the plaintiff's allegations as to the other defendants were made out, the Trust Investment Company's agreement would necessarily cease to affect the land. The indefinite acknowledgment in the prayer of possible rights of that company was made, I infer, from the argument, in the expectation that the company might be allowed a lien for moneys paid by it under its agreement.

In its statement of defence, which was repeated in reply to the amended statement of claim, the Trust Investment Company says it purchased the land from the Trusts and Guarantee Company under agreement in writing, dated 27th March, 1911, for the price of $55,000, of which $18,334 was paid in cash, the balance being payable in three instalments; that at the time of the execution of the agreement and registration of the caveat in question the title to the land was in the Trusts & Guarantee Company as shewn by a certificate of title under the Real Property Act, subject to no encumbrances save a mortgage not now in question; that the company made all proper inquiries and was unaware of any interest save as shewn by the register.

It is alleged that notice of assignment by the Trusts & Guarantee Company to another party of the Trust Investment Company's covenants in the agreement has been received by the latter.

The plaintiff's reply to the original statement of defence of the company was treated as applying to the defence to the amended statement of claim. By that reply all the allegations of the Trust Investment Company are admitted. The words are added, "The plaintiff admits that the purchase of the said lands as aforesaid was made by the said defendant innocently and in good faith."

There is thus said to be raised on the pleadings, without any specific issue of fact concerning it, the question whether the Trust Investment Company is affected by notice, received by means of this action, of the fraud described, supposing such to

have existed. It is contended by the plaintiff that the Trust Investment Company's agreement is, by notice of the plaintiff's rights before completion, subject thereto and that if plaintiff succeeds, the agreement will fall, with a possible right to the purchaser to a lien on the property for the $18,334 it has paid.

The Trusts Investment Company, in short, says that it relied on the certificate of title; that it is in no way concerned with the troubles of the other parties, and should not be harassed thereby, and that it should be dismissed from this action with its agreement unimpaired.

Plaintiff's counsel contended that the contract was not completed, and cited English cases to shew that notice to an intending purchaser, before completion, that equities existed in favour of third parties was sufficient to intercept the contract and prevent the intending purchaser from acquiring title: *Tourville* v. *Nash*, 3 P.Wms. 307, was referred to. Other cases are mentioned in the notes thereto, one being *Wigg* v. *Wigg*, 1 Atk. 384, where Lord Chancellor Hardwicke is reported to have said that, though a purchaser did not know of an incumbrance before he paid his money, yet as he knew it before the deed was executed, it affected him with notice. To meet the idea that, by virtue of the vendor and purchaser agreement, the purchaser was to be taken to be the beneficial owner and the vendor a trustee, authorities were cited to shew that such trusteeship is but a qualified one and does not affect strangers.

This argument is fraught with great possibilities. Carried to its legitimate extent, it means that even after payment of the purchase money, perhaps to assignees, and up to the time of the registration of a transfer to them, the agreement held by the Trust Investment Company may, simply by notice of the supposed equity of the plaintiff, be subject to be defeated thereby. That such a result is possible, at all events where the Real Property Act is involved, is difficult, I must acknowledge, for me to imagine. That many large transactions have no stronger foundation need hardly be said. In many cases contracts have been made for sales again in reliance on such agreements with the registered owner, supported by the usual caveat.

Section 71 of the Real Property Act declares the effect of the certificate of title as conclusive evidence that the person named therein is entitled to the land for the estate or interest specified.

Section 91 reads as follows:—

> 91. Except in the case of fraud on the part of such person, no person contracting or dealing with, or taking or proposing to take an instrument from, a registered owner shall be required or in any manner concerned to inquire into or ascertain the circumstances under, or the consideration for, which such owner or any previous owner is or was registered, or to see to the application of the purchase-money or of any part thereof; nor shall any person be affected by notice, direct,

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implied or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud.

Section 130 declares that any person claiming an estate or interest in land under the new system may file a caveat, etc.

Section 143 says that registration by way of caveat shall have the same effect as to priority as the registration of any instrument under the Act.

It seems to me that section 71 and 91 of the Act conclusively establish the rights of the Trust Investment Company.

Section 91 means nothing if it does not mean that an innocent person may safely contract or deal with a registered owner without inquiry. It certainly cannot mean that though he need not inquire at the time of innocently contracting, yet if he gets the notice later and before completion, his contract shall be affected, possibly nullified, thereby. In short, I take it that the contract is protected throughout, from its inception to its termination by completion or otherwise. If the Act were meant to protect only such transactions as are specifically dealt with in the Act, *e.g.*, actual transfers, mortgages, encumbrances and leases, the words "contracting or dealing with" would not be merely surplusage, but would be misleading.

I am prepared to hold that on the facts admitted on the pleadings the rights of the Trust Investment Company under its contract with the Trusts and Guarantee Company are not affected by the claims of the plaintiffs as set out in the statement of claim.

Aside from all this it seems to me that the statement of claim itself shews an estoppel against the plaintiff in favour of this defendant as he gave Anderson the power of attorney whereby Wickson and the Trusts and Guarantee Company were eventually held out as owners.

In view of the agreement between the parties that I should make such order as upon the pleadings should seem proper with reference to the defendant the Trust Investment Company, the matter is virtually being dealt with as an application for judgment upon admissions under rule 615.* The position of this

*Rules 615 and 616 of the Manitoba King's Bench Act, 1902, are as follows:—

615. Any party to an action may at any stage thereof apply to the Court or a Judge for such order as he may, upon any admissions of facts in the pleadings or in the examination of any other party, be entitled to; and it shall not be necessary to wait for the determination of any other question between the parties; or he may so apply where the only evidence consists of documents and such affidavits as are necessary to prove their execution or identity without the necessity of any cross-examination; or he may so apply where infants are concerned, and evidence is necessary so far only

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defendant is distinct and severable from those of the other defendants. The rule says it shall not be necessary to wait for the determination of any other question between the parties, which, I take it, means all or any of the parties. It would be an injustice to keep the Trust Investment Company's position in suspense until the termination of what promises to be a tedious litigation. This rule may be applied where the judgment would be final and not merely interlocutory: *Re Barker's Estate*, 10 Ch.D. 162 at 165; Holmested & Langton's Judicature Act, 3rd ed., 817.

The case might, as to this defendant, be likewise dealt with under rule 616.*

An order will go directing the entry of judgment dismissing the plaintiff's action as against the Trust Investment Company with costs. That defendant may be quite willing to avoid further connection with the litigation, and may, should it so desire, withdraw its counterclaim without costs.

As to the other defendants the costs of this motion will be costs to them in the cause.

Action dismissed against the Trust Investment Company.

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Robson, J.

N.B.—On an appeal from the decision of Robson, J., of Feb. 23rd, 1912, above reported, the Court of Appeal for Manitoba re-opened the case and vacated the judgment in order that one Orpen, not made a party in the Court below, might prove his alleged interest. (March 19, 1912.)

The order in appeal was as follows:—

This case coming on by way of appeal from the judgment pronounced by Mr. Justice Robson, and it being alleged that one A. Orpen is interested in the subject matter of the suit, it is deemed advisable that the judgment pronounced herein be set aside and the suit reinstated in the same position as it was before the judgment was pronounced.

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as they are concerned for the purpose of proving facts which are not disputed.

(*a*) The foregoing rules shall not apply to such applications, and any such application may be made by motion as soon as the right of the party applying to the relief claimed has appeared from the pleadings.

(*b*) The Court or a Judge may, on any such application, give such relief, subject to such terms, if any, as such Court or Judge may think fit.

*616. Where it is made to appear to the Court or a Judge on the hearing of any application which may be pending before the Court or Judge, that it will be conducive to the ends of justice to permit it, the Court or Judge may direct the application to be turned into a motion for judgment, or a hearing of the cause or matter; and thereupon the Court or Judge may make such order as to the time and manner of giving the evidence in the cause or matter, and with respect to the further prosecution thereof, as the circumstances of the case may require; and upon the hearing it shall be discretionary with the Court or Judge to either pronounce a judgment or make such order as the Court or Judge deems expedient.

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Without deciding the questions of law involved in this matter, it is ordered that the judgment be set aside and vacated. The costs of this appeal and of the proceedings before Mr. Justice Robson to be costs in the cause.

All parties to have leave to amend as they may be advised. Plaintiff to amend within eight days from issue of this order. Defendants within eight days after service of plaintiff's amendment.

[Subsequently to the foregoing decision of the Court of Appeal, a notice of motion was given by the defendant the Trust Investment Company, for the re-instatement and re-consideration of the appeal with the view of having the original judgment restored, on the ground that one Orpen, referred to in the statement of defence of the defendant, the Trust Investment Company, and in the foregoing memorandum of the decision of the Court of Appeal had disclaimed all interest in the property, the subject-matter of the action. The Court of Appeal decided not to entertain this motion and dismissed same without costs.]

Judgment vacated with leave to amend.

QUE.

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July 16.

THE WINDSOR HOTEL COMPANY, Limited (appellants) v. William S. **HINTON** et al. (respondent).

(Decision No. 1.)

Quebec Court of King's Bench (Crown Side), Gervais, J. July 16, 1912.

1. ALIENS (§ I—3)—VOLUNTARY ENTRY INTO CANADA AT HIS OWN EXPENSE—NOTICE POSTED IN NEW YORK—"WAITERS WANTED"—ALIEN LABOUR ACT, R.S.C. 1906, CH. 97, SECS. 2 AND 12.

It is not a violation of secs 2 and 12 of the Alien Labour Act, R.S.C. 1906, ch. 97, for the proprietor of a hotel to employ aliens who have come into Canada at their own expense, in response to a notice written on a blackboard in an employment office in New York, to the effect that six waiters were wanted at once at such hotel in Montreal, with the display of which the hotel proprietor was in no way connected, since the notice did not amount to a promise of employment.

2. ALIENS (§ I—3)—IMPORTATION OF WAITERS—HOTEL CONDUCTED ON THE EUROPEAN PLAN—ALIEN LABOUR ACT, R.S.C. 1906, CH. 97, SEC. 9

The importation of aliens for employment as waiters in hotels conducted on the European plan, is expressly permitted by sec. 9 of the Alien Labour Act, ch. 97, R.S.C. 1906.

Statement

THESE are appeals taken in the four following cases:—

1. An appeal from a sentence given 27th March, 1912, by the Recorder's Court, Montreal, condemning appellants to a fine of $50.00 for having assisted and encouraged the importation and immigration of one A. Manina, a foreigner, from the State of New York into Canada, during the existence of a law of the United States of America against alien labour. The offence was committed on or about the 5th March, 1912.

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2. An appeal from a sentence of the same Court, rendered the same day, for a like amount, for having caused the importation and immigration of one Albert Donnerstag, on or about the 10th March, 1912.

3. An appeal from a sentence of the same Court, rendered the same day, for a like amount, for having caused the importation and immigration of one Emile Karstein, on or about the 10th March, 1912.

4. An appeal from a sentence of the same Court, rendered the same day, for a like amount, for having caused the importation and immigration of one Thomas Lyons, on or about the 10th March, 1912.

Counsel for the parties had agreed in open Court that these four appeals be joined, both for trial and judgment, to all intents and purposes.

Admission was made on behalf of the respondents that the depositions taken in the Recorder's Court, and now in the possession of counsel for the appellants, might be used in place of the depositions of the witnesses who gave them should the latter be before this Court and ready to repeat them, the said witnesses being supposed to be out of Canada.

The appellants are charged with having violated the Alien Labour Act, sections 2 and 12 of chapter 97 of the Revised Statutes of Canada (1906),* during the month of March, 1912, in the manner and under the circumstances hereinbefore recited, to wit: engaging in New York the above-mentioned waiters, all coming from Europe, to work as such in the Windsor hotel, Montreal.

The appellants joined issue with the said charges, as follows:—

1. By way of a general denial or plea of not guilty;

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*Sections 2 and 12 of the Alien Labour Act, R.S.C. 1906, ch. 97, are as follows:—

2. It shall be unlawful for any person, company, partnership or corporation, in any manner to prepay the transportation or in any way to assist, encourage or solicit the importation or immigration of any alien or foreigner into Canada, under contract or agreement, parole or special, express or implied, made previous to the importation or immigration of such alien or foreigner, to perform labour or service of any kind in Canada.

12. It shall be deemed a violation of this Act for any person, partnership, company or corporation to assist or encourage the importation or immigration of any person who resides in, or is a citizen of any foreign country to which this Act applies, by promise of employment through advertisements printed or published in such foreign country.

2. Any such person coming to this country in consequence of such an advertisement shall be treated as coming under a contract as contemplated by this Act, and the penalties by this Act imposed shall be applicable in such case: Provided that this section shall not apply to skilled labour not obtainable in Canada, as hereinbefore specified.

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2. By way of a plea in bar, viz., that the appellants were authorized by section 9† of the said Act to import the said foreign waiters, to develop the new industry of the appellants, that is to say, their European plan hotel service, which has been established for the last four years, as there was, at that date, and since then, a shortage of skilled workers within Canada capable of giving such a service.

C. D. Gaudet, K.C., for the complainants.

L. T. Marechal, K.C., for the Windsor Hotel Company, Limited.

Gervais, J.

GERVAIS, J.:—The evidence given by Karstein in the case shews—although he was a witness for the complainant—that he paid his own expenses to Montreal to work for the appellants; that he came to Montreal after he secured the information that waiters were in demand by the appellants by reading a chalk notice on a blackboard in the office in New York of a labour agency called "The International Geneva Association of Hotel and Restaurant Employees," said notice being in the following words: "Six waiters wanted at Windsor hotel, Montreal, at once."

He paid, on account, to the said association, for its services, a sum of three dollars, in conformity with the laws of the State of New York which regulate such agencies. The said agency is a branch of "The Geneva Waiters' Association." It is also established that said Karstein was not engaged in New York, but in Montreal by one Benaglia, in the employ of the appellants. Donnerstag swears he was engaged under the same conditions as Karstein. Then there is the evidence in the Manina case, in which the immigrant declares, under oath, that he did not know under what conditions he was engaged, though he says that an unknown man gave him a ticket from New York to Montreal.

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†Section 9 of the Alien Labour Act, R.S.C. 1906, ch. 97, is as follows:—

9. Nothing in this Act shall be so construed as—

(*a*) To prevent any citizen or subject of any foreign country, temporarily residing in Canada either in private or official capacity, from engaging, under contract or otherwise, persons not residents or citizens of Canada, to act as private secretaries, servants or domestics for such foreigner temporarily residing in Canada;

(*b*) To prevent any person, partnership, company or corporation from engaging under contract or agreement, skilled workmen in foreign countries to perform labour in Canada in or upon any new industry not at present established in Canada: Provided that skilled labour for that purpose cannot be otherwise obtained;

(*c*) Applying to professional actors, artists, lecturers or singers, or to persons employed strictly as personal or domestic servants; or,

(*d*) Prohibiting any person from assisting any member of his family, or any relative, to migrate from any foreign country to Canada for the purpose of settlement in Canada.

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On behalf of the appellants, both Mr. W. S. Weldon, the general manager of the Windsor Hotel Company, Limited, and Mr. Alex. Shaw, its secretary-treasurer, swear positively, unreservedly, and their statements agree, that neither their company nor any of its representatives including themselves, either personally or as agents assisted or encouraged the importation of the said waiters, directly or indirectly, by promise of payment or re-payment or reward, or in any other way.

It is to be observed that the said chalk notice did not contain any promise of employment, to wit: an act engaging said waiters on behalf of appellants, the said notice was merely written in chalk, on a blackboard, in a private office, to wit: a notice which would not be brought to the knowledge of every one desirous of seeing it. The notice was not that contemplated by section 12 of the chapter cited, that is, a notice implying a promise of engagement of said waiters, published both in their interest and in the interest of the public in general. A notice, such as the one referred to, does not create, as against the appellants, the presumption that they were offering or promising to engage the waiters in question. To create such a presumption, the notice must be one which would bind the appellants to engage the foreign applicants. The complainant has failed to prove, either by direct evidence or by presumption, that the appellants had anything to do with the writing of the said notice or that it was in any way authorized by them. Moreover, the labour agencies above referred to would naturally publish such a notice for the purpose of extending their business, of collecting fees for their services—and the fees are rather high—and this without any direct communication in a shape of a request on behalf of the appellants. It is common knowledge that European hotel employees' associations, particularly the Swiss ones, make persistent efforts to secure employment for their members abroad, especially in America; that they even use Government funds for that purpose, and, therefore, the giving of a ticket to Manina under the circumstances proved upon these appeals is not proof of any relation between the appellants and the New York labour agency which posted the notice. Quite outside any consideration of the interests of the Windsor Hotel Company, the New York labour agency in question might, for business and other reasons, wish to use every possible means to secure the appellants' agency for waiters.

The complainant has failed to prove any case against the appellants. Reference is made to sections 2 and 12 of chapter 97 of the Revised Statutes of Canada.

But there is more than that. The European plan hotel service has not been established within Canada for more than four years. A service of that kind requires special skilled

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waiters, and that there has been a lack of such waiters obtainable within Canada is established by the evidence of Honore Mercier, John Heany, Eugene Kufter, Edouard Legoillat, Arthur Benani, and they have not been contradicted. The appellants adopted the European plan less than four years ago, and the waiters, whose importation is alleged by the private prosecution in these four appeals, were all Europeans, trained according to the usages in existence in Europe for the special duties of their calling, which include the reception of guests, devising a bill of fare for them, setting tables to suit their tastes, and waiting upon them. In European special schools established for the purpose, it takes two years to instil a proper idea of these duties, and waiters having these qualifications, (to wit: those skilled labourers) have been unobtainable within Canada by the appellants.

The hotel industry is just as important as any other, whether in Canada or abroad. The Parliament of Canada has wisely considered it proper not to disregard the needs of this new industry, and it is for the protection of those needs that Parliament has enacted an exception to the law prohibiting the importation of alien foreign labourers.

The appellants have proved the facts alleged in their exception or plea in bar.

The said appeals are sustained; the four complaints are dismissed and the Windsor Hotel Company, Limited, are discharged.

Appeals allowed.

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THE WINDSOR HOTEL COMPANY, Limited (appellants) v. WILLIAM S. HINTON et al. (respondents).

(Decision No. 2.)

Quebec Court of King's Bench (Crown Side), Gervais, J. July 26, 1912.

1. COSTS (§ I—12)—CRIMINAL CASE—APPEAL FROM SUMMARY CONVICTION.

Prosecutions under the Alien Labour Act, R.S.C. 1906, ch. 97, being subject to the summary conviction procedure of the Criminal Code, 1906, no costs can be awarded to the successful party on the allowance of an appeal from a summary conviction thereunder, in excess of the costs taxable under the summary convictions clauses, Part XV. of the Criminal Code.

Statement

APPLICATION made on behalf of the appellants that a fee, the amount of which is left to the discretion of the Court, should be allowed counsel for the appellants upon each of the four appeals sustained by this Court, on July 16th, against convictions under the Canadian Alien Labour Act, R.S.C. 1906, ch. 97. See *Windsor Hotel Co.* v. *Hinton* (No. 1), 5 D.L.R. 224, ante.

L. T. Marechal, K.C., for the application.
C. D. Gaudet, K.C., for the respondents.

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GERVAIS, J.:—The respondents, through counsel, have agreed at the hearing on the 23rd instant of the present application that a fee of fifty dollars in each case would be reasonable; but jurisdiction of this Court to consider an application of this kind is denied as being unauthorized by any provision contained in the Criminal Code.

It is certain that any interpretation placed upon a criminal or penal statutory enactment must be restrictive rather than extensive. Proceeding upon this principle, it follows, under penalty of absolute invalidity, that no Court having criminal jurisdiction can inflict any punishment heavier than that authorized by law.

In that part, XV., of the Criminal Code, dealing exclusively with offences susceptible of appeal, no text of the law provides for the award of counsel fees; on the contrary, strict prohibition exists against any order for fees or costs other than those therein specifically provided for (735, 754, 770, 1044, 1045, 1046, 1047, 1048, 1049, 1050, C.C.).

This is not a prosecution for treason nor that of an indictable offence, under part XVI. or part XVIII., or before jury, in which costs and expenses of prosecution may be ordered to be paid by party convicted.

The application will not be acceded to; the only costs allowed are those which were taxed and included in the four judgments of July 16th, 1912, maintaining the said appeals.

Motion refused.

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July 16.

Benjamin EASTAWAY (complainant, respondent) v. A. LAVALLEE (defendant, appellant).

Quebec Court of King's Bench (Crown side), Gervais, J. July 16, 1912.

1. SHIPPING (§ IV—20)—OFFENCE UNDER CANADA SHIPPING ACT—PROOF OF GUILTY INTENT—R.S.C. 1906, CH. 113.

One who complains of a breach of regulations under Part XIV. of the Canada Shipping Act, R.S.C. 1906, ch. 113, is not required to shew any guilty intent on the part of the person committing such breach or any actual damage resulting therefrom.

2. JUDGMENT (§ II A—67)—EFFECT OF DECISION OF WRECK COMMISSIONER ON RIGHT OF INDIVIDUAL AGGRIEVED—RES JUDICATA—WRECK—R.S.C. 1906, CH. 113, SEC 926.

The decision of the Wreck Commissioner in favour of a person accused of a breach of regulations under the Canada Shipping Act, R.S.C. 1906, ch. 113, does not constitute *res judicata* as against an individual complaining under section 926 of that Act that he has been aggrieved by such breach.

Statement

APPEAL from a summary conviction for an infraction of statutory regulations passed under the Canada Shipping Act.

L. Guerin, for the appellant.

A. R. Holden, for the respondent.

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GERVAIS, J.:—By consent of counsel representing both parties, the evidence taken in the Court below and filed before this Court is the only evidence to be brought on this appeal.

The defendant was convicted on March 22, 1912, in the Montreal Police Court, for having wilfully omitted, near Verchères, in the district of Montreal, on the 21st day of August, 1911, in violation of part 14 of the Canada Shipping Act, to obey the regulations for preventing collisions of vessels on the St. Lawrence river. The defendant, by his present appeal, is now trying to set aside said conviction under which he was condemned to pay a fine of $50.00, or in default of so doing, to go to jail for one month.

Both by the depositions taken in the Court below, and the admission of counsel for the appellant, it is proved that he did, on the said 21st day of August, 1911, wilfully omit to give the two blasts signal, while in charge of the tug "Alaska" towing several barges, and when, near Verchères aforesaid, did change his course to port and cut across the bows of the steamship "Ionian," under charge of the respondent.

The appellant urges that the conviction should be quashed on the following grounds:—

1. That the case has been adjudicated upon by the Dominion Wreck Commissioner of Canada, under section 782 of the Merchant Shipping Act, part X, chapter 113, Revised Statutes of Canada, 1906, and that said commissioner, after investigation, allowed him to go under reprimand but without imposing any fine which he could have imposed;

2. That the appellant had no guilty intent of committing any offence when he omitted to give the said two blasts signal;

3. That the respondent did not suffer any special damage from said breach of the law on the part of the appellant, and that therefore he has not been aggrieved thereby.

The said omission on the part of the appellant, under the circumstances, constituted an immediate danger to the navigation of the said steamship, which was, in consequence thereof, for a certain period of time, obliged to stop her engines to avoid a collision.

The safety and security of navigation on the St. Lawrence river, between the sea and the city of Montreal, is of paramount interest and importance to Montreal, and to the country at large. This Court cannot lightly consider any omission which would go to reduce the safety and security of said navigation.

In the case of simple statutory breach, guilty intent is not required to constitute it, but it results from the mere violation of the statute.

New rules of navigation for preventing collisions and for distress signals, more especially, rules 28 and 29, were substituted by Order in Council, under section 14 of chapter 79 of the Revised Statutes of Canada, said order dated 9th February,

1897, to conform with the new Order in Council of Her Majesty in Council, dated 27th November, 1896, establishing such new rules (30 Can. Off. Gaz., p. 2260), and reading as follows:—

Art. 28.—The word "short blast" used in this article shall mean a blast of about one second's duration.

When vessels are in sight of one another, a steam vessel under way, in taking any course authorized or required by these rules, shall indicate that course by the following signals on her whistle or siren, viz:—

One short blast to mean: I am directing my course to starboard.

Two short blasts to mean: I am directing my course to port.

Three short blasts to mean: My engines are going full speed astern.

Art. 29. Nothing in these rules shall exonerate any vessel, or the owner, or master, or crew thereof, from the consequence of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

The said rules have been violated by the appellant according to his own admission and the evidence adduced in the case. There is a grievance for any person the moment a law has been violated, whether or not such violation has resulted in any actual damage or has constituted a tort, provided it could have had that effect, and that such is the meaning of the word "aggrieved" (*grief*) used in section 926 of chapter 113 of the Revised Statutes of Canada.

The respondent as commander of the said steamship "Ionian," on account of the said breach of the said rules of navigation by the appellant was placed in the danger of suffering from the possibility of damage to his ship and her passengers and cargo, as well as from an official investigation and other vexations. The complainant was not required to prove any guilty intent of committing the said breach on the part of the appellant.

The decision given in the case by Mr. Demers, Dominion Wreck Commissioner, who held an investigation, under part X, of the said chapter, into the circumstances of the crossing of the appellant in front of the steamship "Ionian," without giving the proper signals, was of a mere administrative character; and any decision in such case does not deprive any aggrieved party, such as the complainant, of the right to seek the remedy, under part XIV of the said chapter, in accordance with the Criminal Code, for breach of this part of the Canada Shipping Act.

The decision of the said Wreck Commissioner, under part X, of said Canada Shipping Act, sub-section D, of article 782, does not constitute *res judicata* in the present case; because, in the first place, the object of investigations by the Wreck Commis-

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sioner is to keep the Minister of Marine acquainted with the observance of the laws and rules of navigation, and to prescribe certain penalties in the interest of the Department of Marine; and, in the second place, the penalties provided by said part XIV are of the nature of criminal or penal enactments for the benefit of the public in general. The Court of first instance properly did not take cognizance of the decision of the Wreck Commissioner.

For the above reasons, and in consideration of secs. 924 and 926 of the Canada Shipping Act, the present appeal must fail.

Appeal dismissed, conviction affirmed, and appellant condemned to pay the said fine of fifty dollars, or in default of so doing, to go to gaol for one month; the whole with costs upon the present appeal.

Conviction affirmed.

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EMERSON v. COOK.

Ontario Divisional Court, Falconbridge, C.J.K.B., Britton and Sutherland, JJ. April 3, 1912.

1. TRIAL (§ V C—280)—VERDICT—INSUFFICIENT ANSWERS OF JURY—DISAGREEMENT IN PART ONLY.

Where questions are left to the jury in a negligence action and some of the questions are answered, but the jury disagree as to the answers to other material questions, and therefore omit to answer them, there must be a new trial as to the whole case in like manner as if the jury had not agreed upon any of the questions.

Statement

APPEAL by the defendant and cross-appeal by the plaintiff from the judgment of the Judge of the County Court of the County of Halton.

Action by a farmer against his former farm-servant for damages for injury to a horse by the defendant's negligence, as alleged. Counterclaim for wages and wrongful dismissal.

The action was tried by the Judge with a jury, who answered some questions, but disagreed as to others. The trial Judge treated this as a disagreement upon the whole case, and directed that no judgment be entered, leaving the case to be tried again.

Each party claimed judgment upon the findings.

The appeal and cross-appeal were dismissed.

W. Proudfoot, K.C., for the defendant.

E. H. Cleaver, for the plaintiff.

Falconbridge, C.J.

FALCONBRIDGE, C.J.:—None of the questions submitted was specifically answered by the jury—the first two, which related to the alleged disobedience by the defendant of his master's orders, involved an issue not raised in the pleadings.

When questions are put, the Judge does not always consider it necessary to give as specific instructions on the law as he would do if he were asking for a general verdict; and, therefore,

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a general verdict has been held inappropriate in certain cases where questions have been put, *e.g.*, in *Reid* v. *Barnes*, 25 O.R. 223.

I agree with the learned trial Judge that the finding of the jury here is unsatisfactory as not answering the issues raised between the parties; and so he was right in directing a new trial.

It is unnecessary, in this view, to determine whether an appeal lies in this case.

Falconbridge, C.J.

There was a cross-appeal; and, therefore, there should be no costs.

I think that the appeal and cross-appeal should be dismissed without costs.

BRITTON, J.:—It must, I think, be conceded that the defendant's appeal cannot succeed in any view of this case unless the original questions submitted to the jury were withdrawn, and the jury charged having regard to their finding, and with permission to find a general verdict.

Britton, J.

This was not done. The learned trial Judge did not consider the finding actually made by the jury as consented to by the plaintiff's counsel so as to determine the case. The trial Judge treated the matter, and I think properly, as a disagreement of the jury, and he simply stated, in ordering a new trial, that, before the issues could be determined, a new trial would be required, and that would follow in due course. There was a distinct announcement by the jury of their being unable to agree as to the answer to the first question. The plaintiff was entitled to a finding upon that issue. There should not be any judgment upon what was at most only an answer in part to the liability alleged by the plaintiff.

I agree that the appeal should be dismissed, and that a new trial should be had—as upon a disagreement of the jury upon all points.

Both appeal and cross-appeal dismissed without costs.

SUTHERLAND, J.:—I agree in the result.

Sutherland, J.

Appeal and cross-appeal dismissed.

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July 15.

Manitoba King's Bench. Trial before Mathers, C.J.K.B. July 15, 1912.

1. VENDOR AND PURCHASER (§ I E—25)—RESCISSION FOR EXISTENCE OF HIGHWAY ACROSS SECTION—NOT DISCLOSED IN GOVERNMENT SURVEY.

One who agrees to take a transfer of a half section of land free and clear of all encumbrances, is not obliged to accept one subject to a highway across the land, which was not shewn on the Government survey.

[*Vanderlip* v. *Peterson*, 16 Man. L.R. 341; *Paterson* v. *Houghton*, 19 Man. L.R. 168, referred to.]

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2. CONTRACTS (§ II D 2—170)—CONSTRUCTION OF AGREEMENT FOR SALE OF LAND—CREDIT ON PURCHASE BY CONVEYING OTHER LAND—TIME.

Where a vendor and vendee stipulated in an agreement for the sale of property, that the vendee might, before a certain cash payment was due, obtain a designated credit thereon by conveying certain other property to the vendor, the former is not entitled to such credit where he did not, nor could not, convey the land until after such maturity date.

[*Vanderlip* v. *Peterson*, 16 Man. L.R. 341; *Paterson* v. *Houghton*, 19 Man. L.R. 168, referred to.]

3. BROKERS (§ II B—12)—COMPENSATION OF REAL ESTATE AGENT—INSTALMENT PAYMENTS—ABSENCE OF AUTHORITY OF VENDOR.

Where a vendor and the agent who sold land for him agreed that the agent's commission should be paid him in instalments, as the payments of the vendee fell due, the latter is not entitled to credit for payments made to the agent, to apply on his commission, when made without authority from the vendor.

Statement

THIS is an action to recover the purchase price of an apartment block sold by the plaintiff to the defendant under an agreement dated the 1st March, 1911. The total purchase price was $48,000, payable by deferred payments extending from the execution of the agreement to the 1st March, 1916. There was a mortgage on the land for $19,500, which was to be deducted from the purchase price.

Of the deferred payments the sum of $14,720 was to fall due on the 1st of March, 1912. The agreement provided that the purchaser should have the privilege at any time within one year from its date of transferring to the vendor by a transfer under the Real Property Act free and clear of all encumbrances, the south half of section 1, in township 15 and range 2, west of the principal meridian in Manitoba, and upon so doing he should receive a credit of $6,400 on the payment to be made under the agreement on the 1st of March, 1912.

The agreement also gave the purchaser the privilege at any time within a year, of transferring to the vendor certain other farm lands situate at Westborne and upon so transferring these latter lands to receive a credit of $7,820 on the payment to fall due on the 1st of March, 1912.

These latter mentioned lands were transferred and the defendant became entitled to the credit of $7,820.

C. P. Wilson, K.C., and *H. A. Bergman*, for plaintiff.
H. Phillipps and *H. W. Whitla*, for defendant.

Mathers, C.J.

MATHERS, C.J.K.B.:—The chief dispute in this action is centred on the question of whether or not the defendant had become entitled to the credit of $6,400, by the transfer of the first mentioned lands.

It appears that these lands were crossed diagonally by a highway one and one-half chains wide, which highway was shewn by a plan registered in the land titles office, and to the portion occupied by this highway the defendant had no title. In Novem-

ber, 1911, the plaintiff's solicitors discovered the presence of this highway and notified the defendant's solicitors that title, subject to that highway, would not be accepted. The attitude of the defendant at first was that the plaintiff was bound to accept the land subject to the highway, and no attempt was made by him to have it closed and procure title to it for the purpose of conveying it to the plaintiff until a few days before the 1st of March, 1912. Steps were then taken to close the highway, but as a matter of fact it was not closed nor title procured to it until some time after that, and the defendant had not applied for a title under the Real Property Act to this portion of the half section until after the trial of this action had commenced.

Prior to the 1st of March the defendant's solicitors tendered to the plaintiff's solicitors a transfer of the half section under the Real Property Act, subject to the highway. This transfer was rejected. Subsequently the defendant's solicitors registered this transfer and procured a certificate of title to issue subject to the highway in the name of the plaintiff and sent such certificate of title to the plaintiff's solicitors. They, however, adhered to their refusal to accept the title in that form and subsequently re-transferred the land to the defendant.

The defendant claims: first, that the plaintiff was bound to accept title subject to this highway; second, that if not the defendant was entitled to a reasonable time after the 1st of March to remove the defect.

I do not agree with either contention.

The agreement gives the defendant the privilege, within one year, or before the 1st of March, 1912, of transferring the south half of section 1 in township 15, range 2, west of the principal meridian in the Province of Manitoba, free and clear of all encumbrances, and upon doing so, he was to be entitled to a credit of $6,400. No reference is made to the highway in the agreement, or to any other charge or encumbrance upon the land. The description of the land given, in my opinion, includes all the land shewn by the Dominion Government survey to be included within the half section named, and the plaintiff was not bound to accept anything less.

As to the defendant's second objection, I think that equally untenable. The agreement provided for a cash payment on the 1st of March, but gave him the option on or before that date of transferring the land under the Real Property Act. Upon compliance with that provision he became entitled to the credit, otherwise not. The evidence shews that he did not, and could not convey the land until after the 1st March, and therefore I think he was not entitled to the credit: *Vanderlip* v. *Peterson*, 16 Man. L.R. 341, and *Paterson* v. *Houghton*, 19 Man. L.R. 168 at 175.

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The only other point in dispute was as to a certain payment made by the defendant to a man named Eidsvig. Eidsvig was the agent who had made the sale on behalf of the plaintiff and thereby became entitled to a commission of $1,225. By an agreement made between Eidsvig and the plaintiff, Eidsvig agreed to accept payment of this commission, $250 cash, which was then paid, and the balance $975 as the payments from the defendant to the plaintiff fell due, Eidsvig being entitled to be paid half of each until his balance of $975 was fully paid.

Under the agreement $500 was to fall due on the 1st day of March, 1911. That sum was paid, and out of it the defendant, by the plaintiff's authority, paid Eidsvig $250. $500 more fell due on the 1st of September, 1911, and out of this sum the defendant, by the authority of the plaintiff, again paid Eidsvig $250. This left $475. No other payment fell due under the agreement until the 1st of March, 1912.

The defendant claims to have paid Eidsvig $500 on 26th February, 1912, or $25 more than the plaintiff owed Eidsvig. This latter payment the plaintiff disputes. The evidence shews that as a fact no payment was made by the defendant. The story as related by Eidsvig is that in the fall of 1911 the defendant endorsed his note for $750 and that he paid $250 upon it when due and renewed it for $500, that when the renewal fell due he did not pay it. He then owed the defendant an account for board and gave him a receipt on the 26th February for the $500. The agreement between Eidsvig and Bergman was not an order on Cook, nor did it in any way authorize him to make payments to Eidsvig. It was an agreement between Eidsvig and Bergman alone for the settlement of the commission due by the latter to the former. The two first payments made under it were expressly authorized by Bergman. The latter payment of $475, or as a fact $500, was unauthorized by Bergman and of this Cook is not entitled to credit for it.

I must therefore find that the defendant was in default in making the payment which fell due on the 1st of March, 1912. The agreement provided that on any default in the payment of any instalment of either principal or interest the whole of the principal and interest payable thereunder to the vendor should at once become due and payable.

On the 2nd March, 1912, the plaintiff notified the defendant in writing that as he had made default in payment which was to be made on the 1st of March the whole of the balance of principal and interest secured by the agreement became at once due and payable and he therefore declared the whole of the principal and interest due and payable forthwith.

The plaintiff is entitled to judgment for the whole amount of the principal money and interest payable under the agreement

which fell due on the 1st day of March, 1912, and which was subsequently to fall due, less the sum of $7,820 to be credited on the 1st day of March, 1912, in respect of the Westborne lands and $19,500 to be deducted in respect of the mortgage. If the parties cannot agree upon the computation of this amount the calculations will be made by the registrar. The plaintiff is entitled to the costs of the action.

Judgment for plaintiff.

NICHOLSON v. McKALE.

Quebec Court of Review, Tellier, De Lorimier and Dunlop, JJ. January 19, 1912.

1. BILLS AND NOTES (§ III B—60)—LIABILITY OF ENDORSER — WITNESS GUARANTEEING PAYMENT—"AVAL."

Where one who has witnessed the signatures to a promissory note signs a guarantee of the payment thereof, upon the back of the note, and adds, after his signature, the word "witness," his signature is complete before the addition of the word "witness," which is thus mere surplusage, and he is liable as an "aval" upon the note.

2. BILLS AND NOTES (§ III B 2—65)—LIABILITY OF PARTY PLACING NAME ON BACK OF NOTE BEFORE DELIVERY.

In Quebec, one who puts his name on the back of a note before its delivery or endorsement by the payee is an endorser *"pour aval,"* and is liable without notice of protest or dishonour.

[*Paterson* v. *Pain*, 1 L.C.R. 219; *Merrit* v. *Lynch*, 3 L.C.J. 276; *Pariseau* v. *Ouellette*, M. Cond. R. 69; *Narbonne* v. *Têtreau*, 9 L.C.J. 80, and *Pratt* v. *MacDougall*, 12 L.C.J. 243, referred to.]

3. EVIDENCE (§ II K—318)—TEST AS TO BURDEN OF PROOF—NEGOTIABLE INSTRUMENTS.

The true test to decide upon whom the burden of proof rests in an action on negotiable paper is to ask the question, which party would succeed if no further proof were adduced?

4. EVIDENCE (§ II K—318)—BURDEN OF PROOF IN ACTION ON NEGOTIABLE INSTRUMENT.

In an action on a negotiable instrument a plea of general denial by an endorser puts the plaintiff to the proof only that the defendant signed his name, the burden of proof is upon the defendant if he wish to shew that his signature was intended only in the capacity of a witness.

5. EVIDENCE (§ II E 7—186)—SHIFTING OF BURDEN OF PROOF IN ACTION ON NEGOTIABLE INSTRUMENT ON PROVING FRAUD—VALUE IN GOOD FAITH.

A party suing on a negotiable instrument need not allege, nor at the outset prove, that he gave consideration, or is a holder in due course since these presumptions are in his favour; but, if fraud or illegality be shewn, the burden is shifted, and he must shew that, subsequently to such fraud or illegality, he gave value in good faith.

[*Tatam* v. *Haslar*, 23 Q.B.D. 345, specially referred to. See also Phipson on Evidence, 5th ed., 24.]

6. EVIDENCE (§ II E 1—145)—PRESUMPTION AS TO DESCRIPTIVE TERM FOLLOWING NAME ON NEGOTIABLE INSTRUMENT.

If the name of the maker, payee or an endorser of a negotiable instrument be followed by words indicating a representative capacity, they are generally considered merely *descriptio personæ*, and as such are immaterial.

[See Encyclopædia of Pleading and Practice, sec. V., Negotiable Instruments, at pp. 50 and 471.]

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7. BILLS AND NOTES (§ III B 3—70)—RESTRICTIVE ENDORSEMENT—LIABILITY OF ENDORSER WHO SIGNS IN REPRESENTATIVE CAPACITY BUT FAILS TO RESTRICT THE ENDORSATION.

Signing a negotiable instrument in a representative or descriptive character does not *per se* exempt from personal liability; to escape personal liability an individual must sign in such a way as absolutely to negative his personal liability, and if, through carelessness or otherwise, he fail to do this, he must pay the penalty by being held personally liable.

[*Wakefield* v. *Alexander*, 17 T.L.R. 217, referred to. See also Falconbridge on Banking and Bills of Exchange, p. 471 *et seq.*]

Statement

APPEAL by way of review from the judgment of the Superior Court, Laurendeau, J., delivered on the 20th of September, 1910.

The judgment appealed from was reversed, DELORIMIER, J., dissenting.

Casgrain, Mitchell, McDougall & Creelman, for the plaintiff.

A. Mackay, for the defendant.

MONTREAL, January 19, 1912.

Dunlop, J.

The opinion of the majority of the Court was delivered by DUNLOP, J.:—The plaintiff, the holder of five promissory notes, sued the defendant, the alleged indorser of the notes, for the sum of $131.36, amount of the same, inclusive of interest. The defendant pleaded a general denial in law and in fact. At the trial no evidence was adduced, either by the plaintiff or the defendant, and the plaintiff asked for judgment on the pleadings and exhibits.

The judgment inscribed for review dismissed the action with costs.

The notes in question, which are found in the record, are all payable to the order of the Munro & McIntosh Carriage Company, Limited, three of them being made by one Jas. Tabach, and his signature witnessed by one Chas. McKale. The two others are made by one J. C. Campbell and witnessed by the same witness.

On the back of all the notes appear the words: "For value received I guarantee the payment of the within notes and hereby waive notice of non-payment thereof," and underneath, the signature of the present defendant, J. McKale, followed by the word "witness."

I am of opinion that the learned Judge erred in dismissing the action, and that the defendant McKale should be held liable upon the notes, for the following reasons:—

1. McKale's indorsation is complete before the word "witness" appears. It is only words which come before a signature which can limit or restrict the liability thereupon: Bills of Exchange Act, sec. 68. The word "witness" could be validly struck out by a subsequent indorser, as mere surplusage or description, without in any way acting improperly. When McKale finished writing his signature the indorsation was complete, and he could not negative his liability on the note by merely adding "witness."

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The defendant is an "*aval*" upon the note. The suretyship undertaken by the defendant is in this case, not only from the law, but from the specific guarantee contained on the back of the note and to which McKale immediately subscribed. It is idle for him to urge that he signed as a witness only, when he could so easily have negatived his special guarantee by striking out the particular words on the note—and, in that case, he would have been liable only as an indorser, and have been entitled to notice of protest. He waived this latter privilege knowingly, therefore. It is impossible to presume that he did not know what he was signing.

Robinson v. *Mann*, 31 Can. S.C.R. 484, is the leading case in Canada on this doctrine of "*aval*." Under sec. 56 (131 of the present Act) of the Bills of Exchange Act, 1890, a "person who indorses a promissory note, not indorsed by the payee, may be liable as an indorser to the latter."

In Quebec, one who puts his name on the back of a note before its delivery or indorsement by the payee is an indorser "*pour aval*," and is liable without notice of protest or dishonour: *Paterson* v. *Pain*, 1 L.C.R. 219; *Merritt* v. *Lynch*, 3 L.C.J. 276; *Pariseau* v. *Ouellette*, Montreal Cond. R. 69; *Narbonne* v. *Tétreau*, 9 L.C.J. 80; *Latour* v. *Gauthier*, 2 L.C.L.J. 109; *Pratt* v. *MacDougall*, 12 L.C.J. 243.

The word "witness" is meaningless in the present case. How can this word have any application or weight when the signature to which it is affixed witnesses nothing? Words must be taken to have a meaning, and the person who uses them must have intended them to serve some purpose. In this case there is nothing to witness. McKale cannot witness subsequent indorsements, because the law presumes indorsements to be made in the order in which they appear: sec. 65, Bills of Exchange Act. Nor can he be a witness to the maker's signatures, since these are already witnessed, and, moreover, because of the special contract of suretyship intervening between the signatures upon the face of the note and McKale's signature. What then does McKale witness? Nothing—and the word "witness" is destroyed and reduced to a meaningless surplusage by the lack of something to be witnessed.

The construction most favourable to the validity of the bill must be adopted. This is the principle enunciated by sec. 52, par. 2, of the Bills of Exchange Act, referring to bills signed in a representative capacity. It is applicable here, and the lower Court has erred in adopting a construction unfavourable to the validity of the bill, without doing justice to the parties. For should the notes be held valid, and McKale condemned to pay the value thereof, he has his recourse against makers, who are responsible to him. A construction favourable to the validity of the note will not work injustice upon the defendant. Section 52 is very

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wide, and breathes a principle of equity which our Courts should not be loath to adopt when the interests of justice are served thereby.

In the next place, the burden of proof was upon the defendant. The law presumes the holder of a bill to be *primâ facie* a holder in due course: sec. 58, Bills of Exchange Act, p. 2. The plaintiff is a holder, inasmuch as the last indorsement is in blank: sec. 21, pp. 3 and 1, sub. (*g*), of Bills of Exchange Act. So far as he is concerned, therefore, he has made proof by these legal presumptions that he is a holder in due course.

By sec. 133, sub. (*e*), the indorser is precluded from denying, to a subsequent indorsee, that the bill was, at the time of his indorsement, a valid and subsisting bill, and that he then had a good title thereto.

Having shifted the burden to the defendant—has the latter discharged that burden? The plaintiff says that he has not. The true test to decide upon whom the burden rests is to ask the question—which party would succeed if no further proof were adduced?

The plaintiff having made out a *primâ facie* case, it was for the defendant to rebut the presumptions against him and shew that the plaintiff was not holder in due course, and thus escape the estoppel provided by the article. Again, by his plea of general denial he does not put the plaintiff upon proof beyond the mere fact that the defendant signed his name. The burden of proof is upon the defendant if he wishes to shew that his signature is not his, or that he is a mere witness.

The matter may be summed up as follows: The word "witness," if of any avail, merely creates a presumption of fact that the defendant signed otherwise than as an indorser. This presumption of fact is destroyed and annulled by the equal presumption of fact resulting from the fact that there was nothing to witness. The one meets and defeats the other, so that we are left with the legal presumption establishing the defendant's liability.

Thus, a party suing on a bill of exchange need not allege, nor at the outset prove, that he gave *considération*, or is a *holder in due course*, since these presumptions are in his favour; but if fraud or illegality be shewn, the burden is shifted, and he must shew that subsequently to such fraud, etc., he gave value in good faith: *Tatam* v. *Haslar*, 23 Q.B.D. 345; Phipson "Law of Evidence," at p. 24.

Signing in a representative or descriptive character *per se* does not exempt from personal liability. "But the mere addition to his signature of words describing him as an agent or as filling a representative character does not exempt him (the indorser) from personal liability:" sec. 52, Bills of Exchange Act, last part, p. 1.

It is not merely, as has been sometimes asserted, a question of personal liability attaching through a representative act. The cases go further in holding that, to escape personal liability, a person must clearly designate his intention of not being personally liable upon the note. A mere description, therefore, of the signer as other than he really is will not free him. McKale, in the present case, took no pains to limit his personal liability, as he might easily have done by writing over his signature, say, "without personal recourse." This means of negativing liability is provided for by sec. 34 of the Act. Thus, in the case of *Wakefield* v. *Alexander*, 17 T.L.R. 217, it was held that one who is not the holder of a bill, but who simply puts his name on the back of it, and is only a quasi-indorser, may limit his liability by writing *sans recours* above his signature. It was very simple and would have completely liberated him. We can only infer that the absence of such an expression of intention indicates the true character of the transaction, namely, that McKale is personally liable and knew it at the time, because we cannot presume he meant to negative liability and, through ignorance, failed to do so.

Reasoning by analogy from the numerous decisions holding persons in a representative capacity, such as officials of a company, we find that the true test appears to be, the individual must sign in such a way as to absolutely negative his personal liability, and if, through carelessness or otherwise, he fails to do this, he must pay the penalty by being held personally liable.

We refer to the very full discussion of this question in Maclaren "Bills, Notes and Cheques," 4th ed., 1909, at pp. 160 *et seq.* [See also Falconbridge on Banking and Bills of Exchange, pp. 471 *et seq.*]

It is obvious that a person who signs and adds mere words of description to his name assumes even a greater degree of liability than one who signs in a representative capacity only. These words, the *descriptio personæ*, may be disregarded and taken of no account by a plaintiff. See Encyclopedia of Pleading and Practice, p. 50, *verbo* Negotiable Instruments. *Descriptio personæ*—"If the name of the payee in the body of the note is followed by words indicating a representative capacity, they are generally considered merely *descriptio personæ*, and as such are *immaterial*, and the payee may declare upon the note in his own name, as where the words 'manager,' 'executor' or 'administrator,' 'agent,' 'president,' *or the like*, follows the name of the payee; and being immaterial, if such description is added to the name of the plaintiff it may be disregarded as surplusage and will not prevent a recovery in his individual capacity." Again, at p. 468: (Instruments executed by an agent)—"in an action on an instrument executed by an agent, the declaration need not notice the agency; it may aver that the defendant executed the instrument himself . . ."

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I am of opinion that this action is upon all fours with this authority. McKale's liability on the notes is alleged, and we are not bound to notice his *descriptio personæ*. It was for him to shew how he is not liable: *Fraser* v. *Spofford*, 5 Black Ind. 207; *Moore* v. *McLure*, 8 Hem. N.Y. 557. Again, at p. 471: "An addition to the maker's name which has no legal effect, need not be noticed." (See footnote 1.) See *Fairchild* v. *Grand Gulf Bank*, 5 How. Miss. 597; *Biggs* v. *Andrews*, 5 How. Miss. 597; *Graham* v. *Fahnestock*, 8 Alab. 628.

In Rhode Island the signature of "D.T.L.," with the added words "correspondent for E. J. K. & Co.," was held to bind the signor, the additional words being regarded as mere *descriptio personæ*.

Had McKale added such words as the following, "stenographer," "clerk," "amanuensis," to his signature, could his non-liability be urged? What greater meaning does the word witness convey in the present instance? It is a mere *descriptio personæ*, and may be disregarded by the holder of the note, as it might equally be stricken out by him. The signature on the backs of the notes is either a valid indorsement, or was placed there in error. The error is due to the defendant, who could easily have protected himself, and he should not be allowed to profit, at the expense of the plaintiff, from something which is due to his own fault. The doctrine that he is estopped from denying liability by reason of his own carelessness should be applied: Ewart, "Estoppel," pp. 103 *et seq.*

After a careful consideration of this case, I am of opinion that there is error in the judgment of the Superior Court dismissing the plaintiff's action with costs, and that it should be reversed, the plea of the defendant dismissed, and the plaintiff's action maintained for the full amount sued for, and that the defendant should be condemned to pay costs in both Courts.

Appeal allowed and action maintained.

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PERRYMAN v. JARDINE.

Ontario Divisional Court, Boyd, C., Latchford, and Middleton, JJ.
April 2, 1912.

1. CORPORATIONS AND COMPANIES (§ IV G 5—137)—LIABILITY OF DIRECTORS FOR WAGES—BONA FIDE ATTEMPT TO COLLECT FROM COMPANY—CONDITION PRECEDENT—2 GEO. V. CH. 31, SEC. 96.

In an action against the directors of a company for wages, under section 94 of the Ontario Companies Act, 7 Edw. VII. ch. 34 (see now 2 Geo. V. ch. 31, sec. 96), it must be shewn that there has been a *bonâ fide* attempt to collect the amount of the judgment from the company, and that a *bonâ fide* return has been made that there is nothing in the shape of assets of the company to satisfy it, a mere formal, colourable, or illusory return is not sufficient.

[*Ilfracombe R. Co.* v. *Devon and Somerset R. Co.*, L.R. 2 C.P. 15; *Moore* v. *Kirkland*, 5 U.C.C.P. 452; *Jenkins* v. *Wilcock*, 11 U.C.C.P. 505; *Brice* v. *Munro*, 12 A.R. 453, followed; *Grills* v. *Farah*, 21 O.L.R. 457, distinguished.]

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2. CORPORATIONS AND COMPANIES (§ IV G 5—137)—LIABILITY OF DIRECTORS FOR WAGES—WRIT OF EXECUTION—HEAD OFFICE—2 GEO. V. CH. 31, SEC. 96.

In an action against the directors of a company for wages, under section 94 of the Ontario Companies Act, 7 Edw. VII. ch. 34 (see now 2 Geo. V. ch. 31, sec. 96), owing by the company, it is sufficient if the execution against the company under the judgment first obtained against it, has been directed to the sheriff of the county where the venue is laid, or of the county where the head office of the company is situated.

[*Nixon* v. *Brownlow*, 1 H. & N. 405, and *Brice* v. *Munro*, 12 A.R. 453, followed.]

3. EXECUTION (§ I—2)—TWO WRITS—SHERIFF OF COUNTY WHERE HEAD OFFICE AND WHERE OPERATIONS CARRIED ON—COST OF LATTER.

Where, in an action against a mining company for wages, two executions have been issued, the one to the sheriff of the county where the head office of the company is situated, and the other to the sheriff of the county where the company carries on its business, the costs of the latter execution will be disallowed in a subsequent action against the directors of the company for the wages, under sec. 94 of the Ontario Companies Act, 7 Edw. VII. ch. 34 (see now 2 Geo. V. ch. 31, sec. 96).

[*Marquis of Salisbury* v. *Ray*, 8 C.B.N.S. 193, and *In re Long, Ex p. Cuddeford*, 20 Q.B.D. 316, referred to.]

4. EVIDENCE (§ IV D—409*a*)—ACTION AGAINST DIRECTORS—ANNUAL STATEMENT TO GOVERNMENT—PROOF OF WHO ARE DIRECTORS.

In an action against the directors of a company for wages, under section 94, of the Ontario Companies Act, 7 Edw. VII. ch. 34 (see now 2 Geo. V. ch. 31, sec. 96), a certified copy of the last annual statement to the Government of the affairs of the company, shewing that the defendants were then directors, and the minute-book of the company, shewing that the directorate has not since been changed, is sufficient proof that the defendants are directors of the company.

5. CORPORATIONS AND COMPANIES (§ IV G 5—137)—ALLOWANCE FOR TRAVELLING EXPENSES OF SERVANT—WAGES—CLAIM AGAINST DIRECTORS—2 GEO. V. CH. 31, SEC. 96.

An allowance for travelling expenses can be recovered in an action against the directors of a company under sec. 94, of the Ontario Companies Act, 7 Edw. VII. ch. 34 (see now 2 Geo. V. ch. 31, sec. 96), as a part of the wages for which the directors are personally liable on the company's default, where the employee was entitled under his contract of employment to have his travelling expenses added to the fixed salary.

6. CORPORATIONS AND COMPANIES (§ VI D—338)—WINDING-UP ACT—RETURN OF SHERIFF TO WRIT ISSUED BEFORE WINDING-UP ORDER—R.S.C. 1906, CH. 144, SEC. 22.

Sec. 22 of the Winding-up Act, R.S.C., ch. 144, providing that "after the winding-up order is made, no suit, action, or other proceeding shall be proceeded with or commenced against the company," does not prevent a sheriff from making a return of *nulla bona* to a writ of execution issued prior to the winding-up order.

Statement

APPEALS by the defendants and cross-appeals by the plaintiffs from judgments of DENTON, Jun. Co. C.J., in actions in the County Court of the County of York.

The actions were brought against the defendants, as directors of the Boyd-Gordon Mining Company Limited, to recover the amounts of unsatisfied judgments obtained by the plaintiffs

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Argument

against the company for wages, in enforcement of the right given by sec. 94 of the Ontario Companies Act, 1907 (7 Edw. VII. ch. 34).

The judgments appealed from were in favour of the plaintiffs, except as to the costs of a second writ of execution, which were disallowed. The cross-appeals were from this disallowance.

The appeals and cross-appeals were dismissed.

E. B. Ryckman, K.C., for the defendants argued that the actions, being brought under the statute, must be confined strictly within its limits, and submitted that, as the effect of the order, under the Winding-up Act, was to stay all proceedings against the company, the plaintiffs must fail, the order having been made before the executions against the company were returned. The return must speak from the date when it was made; and on the 20th October, 1911, when the return was made to the *Pukulski* writ, the goods were in the custody of the law: Churchill's Law of Sheriffs, 2nd ed., p. 347. The return of *nulla bona* to the writ was improper, as there were goods, and the return should have stated the circumstances: *Wright* v. *Lainson* (1837), 2 M. & W. 739; *Warmoll* v. *Young* (1826), 5 B. & C. 660; *Grills* v. *Farah* (1910), 21 O.L.R. 457. If it were possible to make a return at all, it should have been a special one; but, after the winding-up order, the Sheriff was not in a position to take any step whatever, even to make a return, as that would be "proceeding with a proceeding" within the meaning of sec. 22 of the Winding-up Act, R.S.C. 1906, ch. 144. The directors are still officers of the company, and as guarantors in respect of wages are only liable after the company has failed to pay. Nor has it been proved that the defendants are directors. This is not proved by the Government return of December, 1910; and the minute-book produced is not evidence under sec. 119 of the Companies Act. In any case, that part of the claim which is for travelling expenses and board should be disallowed.

J. P. MacGregor, for the plaintiffs, argued that the books kept under sec. 113 of the Companies Act were sufficient *prima facie* evidence that the defendants were directors of the company, and the onus was on them to shew that they had ceased to be so. As to the return by the Sheriff, he referred to *Brice* v. *Munro* (1885), 12 A.R. 453, *per* Hagarty, C.J.O., at p. 464. The evidence shews that reasonable efforts were made by the Sheriff to find assets, and that his return was justified by the facts. *Grills* v. *Farah* is a quite different case from the present, as the action was under different provisions from those here in question. The following cases were also referred to: *Gyfford* v. *Woodgate* (1809), 11 East 297, cited in *Avril* v. *Mordant* (1834), 3 L.J.N.S. K.B. 148; *Goubot* v. *De Crouy* (1833), 1 C. & M. 772. The costs of both executions should have been allowed.

Ryckman, in reply.

April 25. BOYD, C.:—The liability of the directors of a company to pay one year's wages of the labourers and servants thereof for services performed while they were directors, requires as a preliminary requisite that an execution against the company is to be returned unsatisfied in whole or in part. This is the same form of words which has frequently been the subject of judicial exposition in various company Acts in respect to creditors and shareholders, *e.g.*, the Railway Act, C.S.C. 1859, ch. 66, sec. 80.

The conclusion not now to be controverted is, that it is enough to satisfy the statute if a *bonâ fide* attempt has been made to collect the amount of the judgment from the company, and that a *bonâ fide* return has been made that there is nothing in the shape of assets of the company to satisfy it: *Brice* v. *Munro*, 12 A.R. 453, at pp. 464 and 468.

It is also sufficient if the writ of execution be directed to the Sheriff of the county where the venue is laid, or the county where the head office of the company is situated, and it be duly returned by him that the company has not any goods or chattels in his bailiwick: *Nixon* v. *Brownlow* (1856), 1 H. & N. 405; *Jenkins* v. *Wilcock* (1862), 11 C.P. 505. The writ having been issued to the Sheriff, he is bound to return it, and it is not shewn that the return in this case is untrue. On the contrary, it appears that he has done all that the law requires. As expressed by Willes, J., in *Ilfracombe R.W. Co.* v. *Devon and Somerset R.W. Co.* (1866), L.R. 2 C.P. 15, it must be shewn that "reasonable efforts have been made to discover property of the company which could be made available to satisfy the judgment," and this has been affirmatively established. The proceedings (prior to the date when the winding-up of the company began) upon the execution were neither formal, illusory, nor fraudulent, and were taken for the purposes of, if possible, obtaining satisfaction of the judgment, and not merely to give colour to the statutory action against the directors. The writ was returned unsatisfied because no effects could be found available to the plaintiffs under it. The tests suggested by *Moore* v. *Kirkland* (1856), 5 C.P. 452, and *Jenkins* v. *Wilcock*, already cited, have been complied with, and in this essential point the case is very different from *Grills* v. *Farah*, 21 O.L.R. 457, where a merely formal return of *nulla bona* was directed and procured by the plaintiff himself.

The winding-up order effectually removes any possible assets, whether goods or lands, from the operation of an execution, but it does not otherwise interfere with the right of the plaintiffs to proceed against the directors for the recovery of the claims which could not be levied out of any discoverable goods or chattels up to the time of the return.

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The remedy of servants by way of preferential claims under the Winding-up Act is limited to three months' wages (R.S.C. 1906, ch. 144, sec. 70); but they are not obliged to look to or wait for some possible relief to this extent under the Dominion statute: they may well resort to the more favourable provisions of the Ontario enactment: *Mackenzie* v. *Sligo* and *Shannon R.W. Co.* (1854), 4 E. & B. 119, and *Palmer* v. *Justice Assurance Society* (1856), 6 E. & B. 1015.

It is argued that the prohibitions of the Winding-up Act forbid the acts of the Sheriff in making his return of what he had previously done, because of the winding-up order of the 29th September, 1911—his return being dated the 19th October, 1911. The writ issued and was received by the Sheriff on the 12th September; he could discover nothing to be seized up to the 29th September; and this is the information which is communicated by his return. That return is not a proceeding against the insolvent company, within the meaning of the Act.

Sections 22 and 23 are to be read together to ascertain their true scope. Section 22 enacts that, "after the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the company, except with the leave of the Court and subject to such terms as the Court imposes." Section 23 is: "Every attachment, sequestration, distress or execution put in force against the estate or effects of the company after the making of the winding-up order shall be void."

The former section is evidently to apply to proceedings prior to and with a view to some judgment, and does not relate to "executions," which are named in the next section: and this section relates to things to be enforced against property, such as "executions" and the like, of a final, and "distress" and the like, of a preliminary nature. It relates, however, to these being "put in force" against the property of the company. This Sheriff's "return" of the execution is merely an intimation that it has not been and cannot be "put in force," and that it is and has proved to be abortive. It is not within the mischief to be avoided, and not within the language of the Act.

Apart from these two main contentions, others were urged before us which my brother Middleton has dealt with and disposed of, and I need not go over the same ground, as I agree with his conclusions.

The judgment is right and should be affirmed, with costs in both cases.

Middleton, J.

MIDDLETON, J.:—These actions were brought by workmen against the defendants as directors of the Boyd-Gordon Mining Company Limited, under sec. 94 of the Ontario Companies Act. This section is as follows: "The directors of the company

shall be jointly and severally liable to the labourers, servants, and apprentices thereof for all debts not exceeding one year's wages due for services performed for the company while they are such directors respectively; but no director shall be liable to an action therefor, unless the company has been sued therefor within one year after the debt became due, nor unless such director is sued therefor within one year from the time when he ceased to be such director, nor before an execution against the company has been returned unsatisfied in whole or in part; and the amount due on such execution shall be the amount recoverable with costs against the directors."

Apart from some minor matters, the main contention of the defendants is based upon the fact that, before the executions against the company were returned, a winding-up order under the Dominion Act had been pronounced. It is said that the effect of this order was to stay all proceedings against the company, and that, therefore, the returns to the executions made after the winding-up are null and void.

The question so raised is of importance, as, if the defendants' argument is well founded, the effect of the winding-up order is materially to diminish the right of wage-earners and the liability of directors; because, under the Ontario statute, the directors are liable to the extent of one year's wages, while, under the Dominion Winding-up Act, the wage-earner is entitled only to a preference for his unpaid wages not exceeding the arrears which have accrued during the three months next previous to the date of the winding-up order: R.S.C. 1906, ch. 144, sec. 70. The question is also of importance because, in many cases, the entire assets of the company in liquidation are taken by debenture-holders; and, if the contention is well founded, the directors, by reason of the winding-up order, may altogether escape this statutory liability.

Before considering the validity of this argument and the other questions raised, it is desirable to set out the facts proved at the trial, at length.

The Boyd-Gordon Mining Company has its head office at Toronto. It conducted mining operations in the district of Nipissing. On the 11th September, 1911, Pukulski recovered judgment against the company for $157.06, wages earned during the months of June, July, and August, 1911, and $22.04 taxed costs, in addition to the costs of execution. Upon the same day writs of execution against goods and lands were issued to the Sheriff of Toronto, and on the following day these were placed in the hands of the Sheriff for execution. Contemporaneously, an execution was issued directed to the Sheriff of Nipissing. This was placed in the hands of that Sheriff on the 15th September.

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On the 16th September, the company made an assignment for the benefit of its creditors; and on the 29th September an order was made for the winding-up of the company under the Dominion Act.

In order that the conditions precedent prescribed by the statute might be complied with, the plaintiffs' solicitor requested the Sheriffs to return these writs of execution, and they were respectively returned unsatisfied. The endorsement upon the writ to the Sheriff of Toronto was: "*Nulla bona*. The answer of Fred. Mowat, Sheriff." The return upon the Nipissing writ was: "Returned unsatisfied. H. Varin, Sheriff." Thereupon this action was brought.

The contention of the defendants is, that the returns made to the writs are void, because, by sec. 22 of the Winding-up Act, it is provided that, "after the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the company, except with the leave of the Court and subject to such terms as the Court imposes;" and by sec. 23 it is provided that "every attachment, sequestration, distress or execution put in force against the estate or effects of the company after the making of the winding-up order shall be void."

The cases collected by Mr. Justice Riddell in *Grills* v. *Farah*, 21 O.L.R. 457, are relied upon as shewing that it is open to the defendants to attack the return in a proceeding such as this. That action, and the cases there cited, were not proceedings under the same provision of the Ontario Companies Act, but were under the provision which enables a creditor of the company to reach the unpaid capital by proceeding against the individual shareholders—analogous to *sci. fa.* Before these proceedings can be taken, it must be shewn that an execution against the company has been returned unsatisfied. *Moore* v. *Kirkland*, 5 U.C.C.P. 452, and *Jenkins* v. *Wilcox*, 11 U.C.C.P. 505, both determine that what the statute requires is not a return *pro formâ*, but a return after due diligence to realise the amount out of the effects of the company. As it is put by Draper, C.J., in the latter case: "It is not, to be sure, a mere illusory formal proceeding, to give colour to proceedings against a shareholder."

Brice v. *Munro*, 12 A.R. 453, establishes that all that is required is, that the execution should be issued to the Sheriff of the county in which the head office of the company is.

Upon the facts in this case, it is quite clear that the return to the execution was not a mere colourable and illusory return, and that the Sheriff had exercised due diligence to find assets within his shrievalty. Upon the hearing it was not shewn that there were any assets which could have been taken under execution. At present it seems to me that the onus was upon the defendants, but the plaintiffs have assumed that it was for them

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to do more than put in the return; and, if they rightly assumed the onus, they have abundantly discharged it.

Then, does the Dominion Act quoted prevent the making of the return after the winding-up? I think clearly not. That statute aims at the ratable distribution of the assets of the company among its creditors; and so the winding-up supersedes the executions and prevents the creditor from further prosecuting his execution against the assets of the company. The Sheriff would then be justified in returning the execution unsatisfied. He is not by the Ontario Act required to make a return *nulla bona;* and I think it would be sufficient if he made a special return, stating: "I return the writ unsatisfied, because I am unable to take the assets of the company within my bailiwick in execution, by reason of the making of an order under the Dominion Winding-up Act for the winding-up of the company." This cannot be regarded as a "proceeding with the writ against the company," which is the thing prohibited by the statute. The Ontario statute, which imposes this liability upon the directors of the company, seeks to protect them from vexatious proceedings while the company has assets to which the creditor may resort. As soon as these assets are withdrawn from and rendered unavailable to the process of the wage-earner, and the Sheriff certifies that there are no assets which he can take, the obstacle is removed and the wage-earner is free to enforce his remedy.

It is argued that the plaintiff has not proved that the defendants are directors of the company. He has put in a certified copy of the last Government return, which shews that the defendants were then directors; and he has produced the minute-book of the company from the custody of the liquidator, these minutes shewing that the directorate has not since been changed. This appears to be sufficient.

Two minor questions were argued before us. It was said that an allowance for travelling expenses did not come within the statute. We thought it did.

Then the plaintiff complained that he had not been allowed the costs of the second writ of execution, and cross-appealed with reference to it. We think the Judge was right in disallowing these. See *Marquis of Salisbury* v. *Ray* (1860), 8 C.B. N.S. 193; and *In re Long, Ex p. Cuddeford* (1888), 20 Q.B.D. 316.

Both appeals should be dismissed. The defendants should pay the costs, less $5 allowed in respect of the cross-appeal.

The facts in the *Perryman* case are substantially similar, and the same order will be made in it.

LATCHFORD, J.:—I agree. Latchford, J.

Appeals dismissed.

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May 10.

THE KING v. COMEAU.

Nova Scotia Supreme Court, Graham, E.J., Drysdale, Russell and Ritchie, JJ. May 10, 1912.

1. SEDUCTION (§ II—7)—MEANING OF "CHARACTER" AS USED IN CRIMINAL CODE (1906) SEC. 212.

The words "previously chaste character" as used in the Criminal Code (1906) sec. 212, as to seduction under promise of marriage, do not necessarily imply that the female shall be "*virgo intacta*."

2. EVIDENCE (§ XII L—999)—WHAT NEGATIVES CHARGE OF SEDUCTION.

A finding that a woman under the age of 21 years had sexual intercourse with the prisoner on a number of occasions in the year 1910, he being then over the age of 21 years, negatives a charge of seduction under promise of marriage based upon a similar act in the year 1911 alleged to have been induced by a promise of marriage.

[*R.* v. *Romans*, 13 Can. Cr. Cas. 68, distinguished; *R.* v. *Lougheed*, 8 Can. Cr. Cas. 184, at p. 187, approved.]

3. SEDUCTION (§ II—7)—UNDER PROMISE OF MARRIAGE—CRIMINAL CODE (1906) SEC. 212.

The promise of marriage referred to in section 212 of Cr. Code (1906) must be an absolute promise and not a conditional promise only to be performed in the event of pregnancy happening, or it will be insufficient to support a charge of seduction under promise of marriage.

4. EVIDENCE (§ VIII—670)—ADMISSION BY ACCUSED IN CRIMINAL CASES —CORROBORATION.

An admission of the prisoner made on the witness stand and a letter written by him saying among other things "I can't marry you now," and making reference to procuring medicine for the girl's pregnancy is corroborative of a charge of seduction under promise of marriage.

Statement

CASE reserved for the consideration of the Supreme Court *in banco*, sitting as a Court for Crown Cases Reserved. The prisoner, Charles Comeau, was charged before Wallace, County Court Judge, under section 212 of the Criminal Code, with having unlawfully seduced and had illicit connection with one A. B., a female of previously chaste character, under the age of 21 years, the prisoner being over the age of 21 years at the time and was acquitted. The case reserved was as follows:—

The prisoner was charged before me under sec. 212 of the Code that he did unlawfully seduce and have illicit connection with one A.B., a female of previously chaste character, under the age of twenty-one years, under promise of marriage, he then being over the age of twenty-one years at the time of the seduction and promise. I acquitted the prisoner. At the request of the Crown I have granted a reserved case upon the following two questions:—

1. The girl's evidence was, "He said that if anything came of it he would marry me." Is such a conditional promise a "promise of marriage" within section 212 of the Code?

2. The girl admitted that she had had illicit intercourse with the accused ten or twelve times in the summer of 1910. This intercourse ceased when he left the district in the autumn of 1910. The first mention of marriage occurred on his return to the district in March,

1911, when, as the result of the conditional promise he then made, as set out in the first question herein reserved, the illicit intercourse was resumed. During his absence she had lived a virtuous life. Was she of "previously chaste character" within the meaning of section 212 when the conditional promise was given in March, 1911?

At the request of counsel for the accused, I also reserve the following point:—

The evidence given in corroboration of the girl's testimony was as follows:—

(*a*) The admission of the accused when on the witness stand, that after taking her to a theatre in Halifax, in the month of June, 1911, he had had sexual intercourse with her in his room in a hotel where they both stayed one night.

(*b*) A letter written by him in February, 1912, in which he says among other things, "I can't marry you now," and makes some reference to getting medicine for her.

(*c*) In his own evidence he admits that he told her to go and see the doctor and he would pay for it.

3. Was she, by the foregoing evidence "corroborated in some material particular by evidence implicating the accused" within the meaning of section 1002 of the Code?

I reserve for the consideration of the Supreme Court *in banco*, sitting as a Court for Crown Cases Reserved, the three foregoing questions.

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Section 212 of the Criminal Code of 1906 reads as follows:—

Everyone above the age of twenty-one years is guilty of an indictable offence and liable to two years' imprisonment, who under promise of marriage seduces and has illicit connection with an unmarried female of previously chaste character and under 21 years of age.

April 2, 1912. *A. Cluny*, K.C., for the Crown:—Illicit connection, with a promise that if anything came of it, defendant would marry is a sufficient promise under sec. 212 of the Code, to constitute a promise of marriage: *The King* v. *Romans*, 13 Can. Cr. Cas. 68; *The King* v. *Lougheed*, 8 Can. Cr. Cas. 184. Where a woman has had illicit connection a number of times and then reforms she can become a woman of "previously chaste character" within the meaning of the Code, sec. 212. *The King* v. *Lougheed*, 8 Can. Cr. Cas. 184 (*supra*); *The King* v. *Romans*, 13 Can. Cr. Cas. 68 (*supra*); 35 Cyc. 1332 and 1333 (note 65); *People* v. *Clark*, 33 Mich. 112; Tremeear's Criminal Code, 2nd ed., p. 140.

Argument

Covert, K.C., for the defendant, *contra*:—The Michigan statute is different from ours and cases decided under that statute do not apply: *People* v. *Millspaugh*, 11 Mich. 278; *The King* v. *Lacelle*, 10 Can. Cr. Cas. 229, 231; *People* v. *Duryea*, 81 Hun. 390; *People* v. *Van Alstyne*, 144 N.Y.R. 361, 39 N.E.R. 343; *People* v. *Nelson*, 153 N.Y.R. 90. There must be corroboration not only as to the act but as to the promise of marriage: Crankshaw's Crim. Code, 3rd ed., p. 186; 25 A. & E. Encyc. of

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Law 244; *Armstrong* v. *People*, 75 N.Y.R. 38; *Kenyon* v. *People*, 84 Am. Dec. 180; *Andre* v. *State*, 68 Am. Dec. 708.

Cluny, K.C., replied.

DRYSDALE, J.:—It will be observed that the first mention of marriage, or of the conditional promise referred to in the "case," occurred in March, 1911, and that illicit intercourse had taken place a number of times in 1910. This finding of fact, I think, disposes of the case and justified acquittal of the charge under the section quoted. When this promise or conditional promise was made it was not possible to say that the girl was then of "previously chaste character." I agree with the New York Court of Appeals in the case of *Kenyon* v. *The People*, 26 N.Y. 203, 207, 84 Am. Dec. 180, where it is said that in a statute similar to this "character" as here used means actual personal virtue, not reputation." The woman must be chaste in fact. The finding here as to the conduct of the parties in 1910 to my mind makes it impossible to lay a charge under this section in 1911. There can only be one offence against such a statute, and bearing in mind what occurred in 1910 it was not open to the prosecution to allege that in 1911 a girl of "previously chaste character" was seduced.

Holding this view it is not necessary to consider the other questions submitted and I would affirm the acquittal herein. If it were necessary to deal with the conditional promise found herein by the learned County Court Judge I would say that the promise of marriage referred to in the section must be an absolute not a conditional promise of marriage only to be performed in the event of pregnancy happening. It was said that the Chief Justice of the Court in *The King* v. *Romans* (1908), 13 Can. Cr. Cas. 68, decided otherwise, but having examined that case I may say I do not think so. The promise sued upon in that case was an absolute promise, and the remarks of the learned Chief Justice must be read, I think, in the light of the facts then before him.

GRAHAM, E.J.:—The Judge of the County Court for Halifax has tried without a jury the defendant for seduction under promise of marriage and has acquitted the defendant. But he has stated a case for the Crown.

The provision is this, sec. 212 of the Criminal Code: "Everyone above the age of 21 years is guilty of an indictable offence . . . who under the promise of marriage seduces and has illicit connection with any unmarried female of previously chaste character and under 21 years of age."

In sec. 213, for seducing female employees the phrase is "any woman or girl previously chaste and under the age of 21 years."

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But I merely refer to it. I do not say now that there is any distinction.

I think that the appeal of the Crown should be dismissed because I think that the prosecutrix was not as a fact a person of previously chaste character, whatever standard is taken, even the more lenient one of some of the States of the American Union, as she appears to have had illicit intercourse with the defendant on ten or twelve different occasions during the summer of 1910. In the autumn he left the district and there was no opportunity for illicit intercourse, but immediately when he returned, in March, 1911, the illicit intercourse, the subject of this prosecution, took place.

The Crown has not made out a case of reform as is contemplated by certain of the American decisions and therefore the appellation of chaste character was not applicable at that time: *People* v. *Squires*, 49 Mich. 487.

But I do not wish to conclude myself from holding when a case arises what Prendergast, J., in *The King* v. *Lougheed*, 8 Can. Crim. Cas. 184, at page 187, suggested might be held, namely, that a woman may have been guilty of an act of sexual intercourse and subsequently become of chaste character, and be the subject of seduction. And he says:—

> But there must be at all events between the two acts of seduction such conduct and behaviour as to imply reform and self-rehabilitation in chastity.

By a person of chaste character if parliament had meant in the case of a girl *virgo intacta*, it was easy to have said so.

In a recent New York case, *People* v. *Nelson*, 153 N.Y. 90, 94, the majority says:—

> We think, however, that a woman can be seduced but once, quoting a passage from a previous judgment of that State, *Cook* v. *The People*, 2 T. & C. 404, in which this is said: "The requisition of the statute, it is held, relates not to the reputation of the prosecutrix but to her actual condition and requires absolute personal chastity. It is therefore, impossible that the offence be twice committed against the same female. If she has once consented to and willingly permitted sexual intercourse with herself she no longer possesses that chaste character required by the statute as an essential ingredient of the offence.

Now, although this passage is quoted it was not necessary in the case of *People* v. *Nelson*, 153 N.Y. 90, to put such an extreme view. If it is intended to repeat that view it has to be qualified in the decision itself, namely, that the first act of sexual intercourse, in order to work a disqualification, from the protection of the statute, must be "voluntary" on her part, "and after she is able to understand its nature and comprehend its enormity": *People* v. *Nelson*, 153 N.Y. 90 at p. 95.

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These qualifications require such a case to be submitted to the jury to say whether the female was of chaste character or not. It is not therefore an absolute physical intactness which is required to constitute "chaste character." And if that has to be submitted to the jury why not the case of a woman who has yielded once before but has at the time of the seduction a chaste character.

The Legislature is speaking of character, something that may be amended, not a material substance like glass. This provision covers the case of a widow being seduced. It would not be considered very extraordinary to speak of a widow as having been seduced twice. Of course it would go to credit.

The moment the notion that the provision is in the case of a girl only for the protection of *virgo intacta* is departed from, as I think the New York case admits that it must be departed from, and that character may be amended, I see no reason for holding that a previous act of illicit intercourse should disqualify a girl from the protection of the provision.

I think the New York Court of Appeal did not intend to overrule one of the previous decisions of that state. It quotes one with approval, namely, *Carpenter* v. *The People*, 8 Barbour (N.Y.) 603.

In that case, Welles, J., delivering the judgment of the Court, dealing with the expression "previous chaste character" says at p. 608:—

> The word "previous" in this connection must be understood to mean immediately previous, or to refer to a period terminating immediately previous to the commencement of the guilty conduct of the defendant. If the female has previously fallen from virtue but has subsequently reformed and become chaste there is no doubt but she may be the subject of the offence declared in the statute.

The State v. *Carron*, 18 Iowa 372, 87 Am. Dec. 401, the note is:—

> Unmarried female may reform and gain character for chastity within the meaning of a provision making the seduction of a female of "previously chaste character" a crime, where she has become unchaste by sexual intercourse. Question of previously chaste character of prosecutrix is one of fact for jury in a criminal prosecution for seduction.

The Court says at p. 375:—

> It is laid down by Mr. Bishop in his most excellent commentaries on Criminal Law, vol. 2, sec. 1109, that the meaning of the term "previously chaste character" is that she shall possess actual personal virtue in distinction from a good reputation. But though she has fallen, yet if, at the time of the seduction, she is reformed, her case is within the statute.

In *The People* v. *Mills*, 94 Mich. 630, where the expression was "theretofore chaste" it is said in the judgment at p. 40:—

> Under the statutes of many of the States, previous chaste character in the person alleged to have been seduced is necessary and character under such statutes has been defined to be not external reputation for chastity but actual personal possession of chastity; yet it has been held that one who falls from virtue but afterwards reforms is chaste within the meaning of such a statutory provision: Wharton, Crim. Law, 1757; Bishop, Stat. Crimes, sec. 649; *Com.* v. *McClosky*, 2 Penna. Law. J., 351; *Wilson* v. *State*, 73 Ala. 527; *Benstine* v. *State*, 70 Tenn. 169; *State* v. *Timmens*, 4 Minn. 325; *State* v. *Brinkhaus*, 34 Ill. 285; *State* v. *Carron*, 18 Iowa 372; *State* v. *Dunn*, 53 Iowa 526.

Then reference is made to *Carpenter* v. *The People*, 8 Barbour (N.Y.) 603, and part of the passage already quoted is given. Then a passage from *State* v. *Dunn*, 53 Iowa 526, where eight years before a girl had fallen at 14 years of age, is quoted as follows:—

> If as a child she was indiscreet, immodest or impure she may have reformed and become a woman of chaste character. A woman who is unchaste may reform and gain a character for chastity within the meaning of the statute defining the crime of seduction.

The Court proceeds:—

> In *Wilson* v. *State*, 73 Ala. 527, it is said that it is not intended that the woman who may have at some time fallen cannot be the subject of seduction. That may be true and there may be reformation and at the time she yields "she may have the virtue of chastity not in the high degree of the woman who has not strayed but yet within the meaning of the statute entitling her to its protection."

The Court in the Michigan case said, p. 639 (*People* v. *Mills*, 94 Mich. 630):—

> Clearly the statute under which the charge is made does not exclude from its protection a female who may have erred but who has reformed and for many years has led a virtuous life, nor can it be contended that it includes virgins only within its terms.

I think that in view of these authorities of the country from which this statutory provision was taken we ought not unnecessarily to come to any decision which would preclude us from considering them when a case comes before us of the kind dealt with in them.

I also wish to add that I express no opinion as to whether a conditional promise such as was made in this case comes within the provision of the case I have quoted.

The passage in Wharton, sec. 1757, is as follows:—

> But if since the prior acts of unchastity she has reformed, she regains the protection of the statute. For it would be inhuman and perilous to assume that women once fallen but reformed are to be afterwards exposed without redress to a seducer's art. The policy of the law in such cases is to reclaim and guard.

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RUSSELL, J.:—I agree entirely with my brother Graham.

RITCHIE, J.:—As to the first question reserved, I cannot distinguish *The King* v. *Romans*, 13 Can. Cr. Cas. 68, from the present case. It is an authority binding upon me, and for this reason only I answer the first question in the affirmative.

The second question reserved I answer in the negative. It is, I think, very obvious that a woman who had sexual intercourse with a man ten or twelve times in the summer and autumn of 1910, which intercourse only ceased when he went away, cannot be said to be of "previously chaste character" when she again had sexual intercourse with him in March, 1911.

I do not, however, think that a girl must necessarily be a virgin to be entitled to the protection of the statute.

What the statute is dealing with is character; otherwise a young girl who goes wrong, quickly repents and is absolutely virtuous for the next twenty years, has no "previously chaste character," and she never can acquire such character. I do not think the words of the statute properly bear this construction, and it is not in my opinion the ordinary meaning of the words.

As to the remaining point reserved, I am of opinion that there was ample evidence in corroboration.

Acquittal affirmed.

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THE KING v. JAMES SIDNEY.

Saskatchewan Supreme Court, Wetmore, C.J., Newlands, Johnstone and Lamont, JJ. July 15, 1912.

1. HUSBAND AND WIFE (§ I A 2—19)—CRIMINAL LIABILITY OF HUSBAND FOR FAILURE TO PROVIDE "NECESSARIES" FOR WIFE AND CHILDREN—ESSENTIALS OF OFFENCE—CAN. CR. CODE 1906, SEC. 242.

It must be established, in order to convict a husband under sec. 242 of the Criminal Code, for failing to provide necessaries for his wife or children, whereby their death resulted, that the articles or things which, without lawful excuse, he omitted to furnish were "necessaries" within the meaning of such section of the Code, and also that the death of his wife or children followed as a result of his omission to provide them.

[*The King* v. *Wilkes*, 11 Can. Cr. Cas. 226, and *The King* v. *Yuman*, 17 Can. Cr. Cas. 474, referred to.]

2. DEFINITIONS (§ I—11)—MEANING OF "NECESSARIES" AS USED IN CAN. CR. CODE 1906, SEC. 242.

"Necessaries" for failing to provide which for his wife or children, a husband is liable under sec. 242 of the Criminal Code, are such things as are essential to preserve life, since such word is not used in its ordinary legal sense, and what will constitute necessaries must be determined in view of the circumstances of each particular case.

[*R.* v. *Brooks*, 5 Can. Cr. Cas. 372, approved.]

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3. HUSBAND AND WIFE (§ I A 2—19)—LIABILITY OF HUSBAND—WIFE VOLUNTARILY LEAVING HOME—INSUFFICIENT CLOTHING—DEATH FROM FREEZING—CAN. CR. CODE 1906, SEC. 242.

A husband's failure to follow his wife and bring her back to his house, which she left in anger, on a bitterly cold night, and, being thinly clad, was frozen to death, does not render him criminally liable under sec. 242 of the Crim. Code, for failure to furnish her with "necessaries," where he provided a home according to his station in life and supplied his wife, who was in possession of all her faculties, with plenty of warm clothing, and, when she left his home, he had reason to believe that she had gone to a neighbour's but instead she got lost on the way.

4. INFANTS (§ I B—8)—CRIMINAL LIABILITY OF PARENT FOR FAILURE TO PROVIDE NECESSARIES FOR CHILDREN—CAN. CR. CODE 1906, SEC. 242.

A father is not criminally liable under sec. 242 of the Crim. Code for failing to provide necessaries for a child ten years of age, who was taken by its mother, in anger, from the father's house on a bitterly cold night, and who was, with its mother, frozen to death, where the father, who had provided a home according to his station in life, had reason to believe that the mother and child had gone to a neighbour's, but, instead, they were lost on the way, since the father did not have reason to anticipate that the mother would expose the child to such danger.

[*Rex* v. *Wilkes*, 12 O.L.R. 264, 11 Can. Cr. Cas. 226, specially referred to.]

Statement

CROWN case reserved on the conviction of defendant for criminal neglect of his wife and child, whereby their death resulted.

P. E. MacKenzie, for Crown.

T. D. Brown, for accused.

The judgment of the Court was delivered by

Lamont, J.

LAMONT, J.:—The accused was charged before my brother Brown, sitting with a jury at Saskatoon, on the following counts:—

(1) For that he the said James Sidney on or about the ninth day of January, in the year of our Lord one thousand nine hundred and twelve, near Biggar within the said judicial district of Saskatoon, being then and there as parent under a legal duty to provide necessaries for Samuel Sidney, a child under the age of sixteen years, did unlawfully omit without lawful excuse to do so while such child remained a member of his household and the death of such child was caused by such omission contrary to section numbered 242 of the Criminal Code.

(2) For that he the said James Sidney on or about the day and near the place aforesaid being then and there under legal duty to provide the necessaries for Florence Sidney, his wife, did omit without lawful excuse so to do and the death of his said wife was caused by such omission contrary to sub-section two of section numbered 242 of the Criminal Code.

(3) For that he the said James Sidney on or about the day and near the place aforesaid did unlawfully, by omitting to provide necessaries for the said Samuel Sidney and Florence Sidney, an act

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which it was then and there his duty to do, cause grievous bodily harm to the said Samuel Sidney and Florence Sidney contrary to section numbered 284 of the Criminal Code.

On this charge he was found guilty by the jury. After the verdict was given, the learned trial Judge, on application by counsel for the accused, reserved for the consideration of the Court *en banc* the following question: "Is there any evidence on which the jury could convict?"

The evidence shews that on January 9th, 1912, Florence Sidney, wife of the accused, and Samuel Sidney, his ten year old son, left the accused's home under the circumstances related below, and were frozen to death on the prairie. The "necessaries" which counsel for the Crown claims the accused unlawfully omitted to provide are that he, knowing of their departure from his house at a time when the temperature was thirty-seven degrees below zero, did not follow them and see that they did not suffer death or grievous bodily harm from exposure. The circumstances under which they left the house were as follows:—

The accused was working a farm near Biggar for a man named Hart. On the farm was a small house, or shack, in which resided the accused, his wife, and seven children, of which the eldest, Rose Sidney, was fifteen years old. At the time in question, and for two weeks prior thereto, there was also living with them one George Stock, a brother of the accused's wife. The house was small, and consisted of but two rooms, the kitchen, and one other room in which the accused and family slept. Owing to the limited accommodation in the house, Mrs. Sidney did not relish having her brother residing with her, although she said nothing to her brother about it. At that time she was in a pregnant condition, and at such times was given to fits of bad temper and crankiness and was difficult to get along with. On January 9th the accused and George Stock went to Biggar to get some supplies for the house. They returned home about 4.30 in the afternoon. The day was exceedingly cold, the temperature being 37 degrees below zero. On arriving home, cold and chilled, they went into the house to get warm. The accused said to his wife, "What have you got hot for us?" She said, "Who is 'us'?" The accused replied, "George and I." She said, "It is only you I have to think about, not George." Stock then went out to the sleigh and carried in his trunk, which they had brought with them from town. On seeing the trunk Mrs. Sidney said there was not room enough in the house for her things and the trunk, and if it was going to be in, she was going out for the night. She then opened the door and went outside for a moment. Coming in, she said to her son Samuel, about ten years old, "Come on, sonny, get on your things and we will go

out for the night." She then put on her jacket, cap and mitts, and her shawl. She had nothing on her feet but house slippers and stockings, and was otherwise thinly clad. The boy put on his outside wraps and was warmly clad. As she was going out she made a remark in the hearing of her brother and her daughter Rose, to the effect that her husband would carry their corpses in. This, however, the accused did not hear. A few minutes after they went out George Stock got up, saying he would not like to see them frozen to death, and asked the accused if he would go after them. The accused said no, they would be back in a minute or two. Stock, however, went out, and came back saying he could hear them talking by the pig-stye. The accused said if they were going that way they were going to Lefebre's. Lefebre was a neighbour living one and a half miles to the south. Supposing they had gone to Lefebre's, nothing was done to ascertain where they were that night or the next day. The reason for this, the accused stated, was that he had learned from experience that when his wife became cranky the best thing to do was to leave her alone, as it only aggravated her the more to follow her and seek to persuade her to return. On January 11th, Stock started over to Lefebre's to see if they were there, and he found their bodies frozen stiff on the prairie. From the tracks they made in the snow it was evident they had started for Lefebre's and had got within 200 yards of the house when they took the wrong side of a bluff and could not find the house; they then took the trail back the way they had come, and had covered the greater portion of the road back when they evidently lost the trail and turned into the bluff where they were found. The evidence also shewed that on a former occasion Mrs. Sidney had threatened to take poison and the accused had to take it away from her, and about two weeks before January 9th, she had thrown herself in the snow and had to be carried in by the accused. According to his station in life, the accused provided well for his wife and family. Although his wife went out thinly clad, and with only house slippers on her feet, she had in the house three pairs of felt shoes, an abundance of warm, heavy underwear, a fur coat, and other clothing suitable for that climate. The family were well fed and housed, and there was no lack of what are ordinarily termed the necessaries of life. Under these circumstances, can it be said that the accused did unlawfully omit to provide either his wife or child with "necessaries" within the meaning of section 242 of the Code, under which counts (1) and (2) of the charge are laid. That section is as follows:—

242. Every one who as parent, guardian or head of a family is under a legal duty to provide necessaries for any child under the age of sixteen years is criminally responsible for omitting, without lawful

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excuse, to do so while such child remains a member of his or her household, whether such child is helpless or not, if the death of such child is caused, or if his life is endangered, or his health is or is likely to be permanently injured, by such omission.

(2) Every one who is under a legal duty to provide necessaries for his wife, is criminally responsible for omitting, without lawful excuse so to do, if the death of his wife is caused, or if her life is endangered, or her health is or is likely to be permanently injured, by such omission.

In order to justify a conviction under this section it must be established (1) that the articles or things which the accused omitted to provide for his wife or child came within the term "necessaries" as used in the section; (2) that the accused omitted to provide them without lawful excuse; and (3) that the death of his wife and child were due to his failure to make such provision: *The King* v. *Wilkes*, 11 Can. Cr. Cas. 226; *The King* v. *Yuman*, 17 Can. Cr. Cas. 474.

As I have already said, the duty which the accused is charged with having neglected to perform is that he did not go after his wife and son when he saw them go into the cold and bring them back to the house before they died from exposure. Does this come within the term "necessaries" which under section 242 it is his duty to provide? "Necessaries" have been held to include food, clothing, shelter and medical attendance: *The King* v. *Lewis*, 7 Can. Cr. Cas. 261; *The King* v. *Wolfe*, 13 Can. Cr. Cas. 246, and in my opinion this list is not to be taken as exhaustive. In *The King* v. *Brooks*, 5 Can. Cr. Cas. 372, "necessaries" were held to mean such necessaries as tend "to preserve life" and not necessaries in the ordinary legal sense.

What is to be considered as necessaries must be determined by the circumstances of each particular case. I can readily conceive that if a father knew or should have known that his child of tender years was out on the prairie in danger of being frozen to death, and he had the ability to succour it and omitted without lawful excuse so to do, he might properly be convicted under this section. To send aid to him under those circumstances might be just as necessary and just as much a parent's legal duty as to send for medical assistance in case of sickness. But under the circumstances of the present case can it be said that the accused, at any time before the death of his wife and son knew or ought to have known that the assistance he is charged with not rendering was necessary? There is no evidence from which, in my opinion, such a conclusion could properly be drawn. So far as the count charging him with failure to provide necessaries for his wife is concerned, no reasonable argument, it seems to me, can be advanced to support the contention of the pros-

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cution. In *Reg.* v. *Smith*, 10 Cox 82, at p. 94, Erle, C.J., stated the law as follows:—

> The law is undisputed that if a person, having the care and custody of another who is helpless, neglects to supply him with the necessaries of life, and thereby causes or accelerates his death, it is a criminal offence; but the law is also clear that if a person having the exercise of free will chooses to stay in a service where bad food and lodging are provided and death is thereby caused, the master is not criminally liable.

The converse of this seems equally true, that where a woman having the exercise of free will chooses to leave the shelter provided for her by her husband and to go out into the cold and is frozen to death, the husband is not criminally liable.

Here the accused had provided sufficient shelter for his family, and there is no evidence from which it could be found that the woman was not in possession of her faculties and capable of exercising her free will. Her death, therefore, must be attributed to her own act in leaving the house rather than to the failure of the accused to provide her with necessary shelter.

Now, as to the son. The duty of the accused to his ten year old son is more far-reaching than to his wife. The boy had not reached the years of discretion, and could not be said to have the exercise of his free will. The accused, therefore, could not expect from the boy that sound discretion and common sense he had a right to look for in the mother; and if the boy had, to the knowledge of his father, gone out alone at dusk to go a mile and a half to the neighbour's on such a night as January 9th, and the accused allowed him to do it, and as a result the boy was frozen to death, I would not be prepared, at least without further consideration, to say that the jury were wrong in finding him guilty, for in that case he would know, or he ought to know, that by going out on such a night the child would probably become lost and freeze to death. But where the child does not go out alone, but goes under the guidance of its mother, different considerations apply. In *Regina* v. *Bubb; Regina* v. *Hook*, 4 Cox 455, it was laid down that where a father provided sufficient food for his child, which was three years old, but the person in immediate charge of the child wilfully withheld the food from it, and as a result the child died, the father could not be convicted of manslaughter unless it was proved that he knew that the food was withheld, and knowing it, did not interfere. This principle, it seems to me, is applicable to all necessaries referred to in section 242. Therefore, to justify the conviction of the accused for failure to provide necessaries for his boy, it must appear that at some time before the boy's death he knew or ought to have known that the assistance he is charged with neglecting to pro-

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Lamont, J.

vide was necessary in order to prevent the boy's life being endangered or his health permanently injured. He knew the boy had left the shelter of the house, but he did not know that he was in any danger. When he was informed that the boy and his mother had gone by the pig-stye, he assumed they were going to Lefebre's. That he was justified in his assumption is proved by the fact that they did go to Lefebre's, but by an unfortunate mistake they took the wrong side of a bluff and failed to find the house. Had they obtained the shelter they expected, and which the accused believed they would get at Lefebre's, no liability could have attached to the accused: *Rex* v. *Wilkes*, 11 Can. Cr. Cas. 226, 12 O.L.R. 264.

There is no evidence to shew that the accused should have anticipated that his wife, who had been at Lefebre's many times, would get lost on the way, or that she would deliberately expose the child to danger; and in the absence of anything which did lead or should have led him to the conclusion that the child was in danger he could have no knowledge that the assistance which, it is claimed, he should have rendered was necessary to the safety of the child. It therefore, could not come within the meaning of the term "necessaries" in sec. 242, because those "necessaries" are such things as an ordinary and reasonable man would know were necessary to be supplied.

The question submitted by my brother Brown should, therefore, be answered in the negative.

Wetmore, C.J.

WETMORE, C.J.:—I agree with the conclusion reached by my brother Lamont. I may say it is possible that the accused may, in respect to the boy Samuel, have been guilty of manslaughter by reason of culpable negligence in the same way that a woman has been held liable for manslaughter for exposing a child of tender age and helpless where it is liable to be killed and is killed. That was by reason of a common law omission, however.

I am of opinion that under the circumstances of this case the accused was not guilty of the crime charged by reason of omission to supply necessaries.

Conviction quashed.

CORINTHE et al. v. SEMINARY OF ST. SULPICE of Montreal.

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Judicial Committee of the Privy Council, Viscount Haldane, L.C., Lord Macnaghten, Lord Atkinson, Lord Shaw, and Sir Charles Fitzpatrick, July 19, 1912.

July 19.

1. INDIANS (§ II—8)—TITLE TO SEIGNIORY OF THE LAKE OF TWO MOUNTAINS—OKA INDIANS IN QUEBEC.

The effect of the Act 2 Viet. (Can.) ch. 50 (see now C.S.L.C. 1861, ch. 42), is to place beyond question the title of the Seminary of St. Sulpice of Montreal to the Seigniory of The Lake of Two Mountains, and to make it impossible for the Indians of Oka to establish an independent title either to possession or control in the administration of the seigniory, either by prescription or aboriginal title or on the theory that the title of the seigniory was merely as trustees for the Indians; any benefits to which the Indians were entitled as upon a statutory charitable trust enforceable by legislation, or possibly in an action by the Attorney-General, were not such as to support an action for recovery of the land by the elected chiefs of the bands of Indians concerned.

Statement

APPEAL from a judgment of the Court of King's Bench for Quebec (Appeal Side), affirming a decision of Mr. Justice Hutchinson.

The appeal related to the title to the ownership of the Seigniory of the Lake of Two Mountains at Montreal, in regard to which for over a century a controversy has existed. The appellants are the elected chiefs of a band of Indians residing at Oka within the limits of the Seigniory. They claimed to be the owners of the Seigniory and demanded possession of it on three grounds: (1) That they are the descendants of the first aboriginal occupants; (2) that they have acquired a title by prescriptions, *i.e.*, by 30 years' possession, and (3) that the titles of the respondent ecclesiastics—if they existed—were only as trustees for the benefit of the Indians. They allege that the Indians have from time immemorial enjoyed the use of the common lands to cut firewood and pasture cattle, and other purposes consistent with common ownership, and that the ecclesiastics were now forcibly preventing the Indians from exercising their rights, were selling plots of the land to white people, and had fenced in a large portion of the common.

The modern title of the Ecclesiastics of the Seminary of St. Sulpice of Montreal is contained in a statute of Canada, first enacted by 2 Viet. ch. 50, re-enacted by 3 and 4 Viet. ch. 30, and now included in chapter 42 of the Consolidated Statutes of Lower Canada of 1861. The effect of the statute is, briefly, to recognize and, if necessary, to constitute the respondents as a corporation, to confirm their title to this particular Seigniory with others, and to impose upon them certain obligations in regard to their sub-grantees.

The Canadian Government, considering it desirable in the public interest that these conflicting claims should be finally

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determined, directed these proceedings to be taken, and undertook the payments of the costs on both sides.

Mr. Justice Hutchinson, who tried the case, thought that the Indians had not occupied the land as proprietors, but that the seminary of St. Sulpice had been placed by statute under the obligation of promoting and continuing the mission of the Lake of Two Mountains for the instruction and spiritual care of the Indians, which must involve their right of residence in that district and of cutting wood and pasturing their horses and cattle. From that decision both parties appealed.

The Indians reiterated their claim to absolute ownership. The ecclesiastics, on the other hand, insisted that the Indians had no right in the Seigniory at all, and that the obligations of the ecclesiastics to the Indians (if any) were simply to give them instruction and spiritual care, and for these purposes to permit them to reside in such convenient and accessible places within the Seigniory as they might designate. The Court of Appeal dismissed both appeals. From that decision the present appeal was instituted.

Argument

R. C. Smith, K.C. (of the Canadian Bar), and *Rowlatt*, appeared for the appellants.

Sir Robert Finlay, K.C., *Geoffrion*, K.C. (of the Canadian Bar), and *Geoffrey Lawrence*, for the respondents.

Mr. *Smith*, who said he was instructed by the Minister of Justice to argue the case of the Indians, submitted that the Government desired to have the whole contention in regard to these lands definitely discussed and decided. There had been constant agitation and friction on the subject for the last 40 or 50 years, and it was time that it should come to an end. The history of the matter began in 1663, when the original grantees of the Island of Montreal, on which the city was built, transferred their rights to the Seminary of St. Sulpice of Paris, who in 1677 received an edict from the King of France to establish in the island a community and seminary of ecclesiastics. The ecclesiastics, thus established, opened a mission just outside the walls of Montreal for the conversion and education of the Indian tribes who had pitched their tents under the walls. Ultimately the mission was removed to the north shore of the Lake of Two Mountains, and two Royal grants, in 1717 and 1733, of land for the purposes of the seminary were made. These constituted the Seigniory of the Lake of Two Mountains. Those grants by the French Crown were not, it was submitted, absolute grants, but were grants to the ecclesiastics in trust, the Indians being the real beneficial owners and the ecclesisties were trustees of the Seigniory on behalf of the Indians.

The two contentions might thus be summarized. The Indians asserted an absolute or beneficial ownership, while the ecclesias-

ties, on the strength of their grants and the statute, said the Indians were only there out of tolerance and grace on their part, and had no legal rights at all, except perhaps to cut wood and pasture cattle and live where they were allowed.

Sir Robert Finlay, interposing, said the respondents did not admit that there was a trust of any sort or kind. The modern position of the community was recognized and regulated by the statute 2 Vict. ch. 50, on which they had ever since acted, and which was purposely passed to dispel doubts as to the right and title to such seigniories, which doubts had been raised after the Treaty of Paris.

In the course of the argument some of their Lordships expressed a doubt whether any absolute ownership of the land by the ecclesiastics had been established, and suggested that the justice of the case might be satisfied if their right, as trustees for the mission, was conceded, and an investigation made as to the way in which the trust might be exercised in the interests of all parties.

R. C. Smith, K.C., continuing his argument in support of the claim, contended that the Oka band of Indians, represented by the appellants, was entitled as of right to the use, enjoyment, and occupation of the whole Seigniory, or, in the alternative, that the respondents were trustees for them of the whole of the Seigniory. The respondents' title, if any, was subject to a statutory trust declared by the ordinance 3 and 4 Vict. ch. 30, in favour of the Indians, and the latter's rights and title had not been taken away by the ordinances and statutes relied on by the respondents.

Rowlatt, who followed on the same side, suggested that should the question hereafter be raised in another form their Lordships' judgment in the present case should leave it open to the appellants to argue that there was a special trust affecting the Seigniory for the residence, education, and religious instruction of the Indians if the Indians wanted to avail themselves of it.

Sir Robert Finlay, for the respondents, said that there was no ground for the claim put forward in the action, and he asked that the appeal should be dismissed.

Geoffrion, K.C., following on the same side, maintained that the respondents were the absolute owners of the property for all the purposes for which they existed. He pointed out that every one of the Indians had been given by the respondents a definite lot to reside on. The Seminary had never tried to chase them out or to refuse them occupation of the lands. The whole fight began by the Indians believing that they owned absolutely or beneficially the whole Seigniory, and that controversy had been going on for over 100 years. The Seminary also paid $20,-

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000 for the expense of removing some of the Indians to other lands, but a number of them came back again.

London, Eng., July 19, 1912. THE LORD CHANCELLOR (VISCOUNT HALDANE) delivered the judgment of the Board:—For upwards of a century a controversy had existed concerning the title to the Seigniory of the Lake of Two Mountains. The Ecclesiasties of the Seminary of St. Sulpice of Montreal, on the one hand, had claimed it under grants from the King of France, and under statutes passed later on by the Canadian Legislature.

Their assertion had been that they held the Seigniory in the full proprietary title, and that the Indians residing within the limits of the Seigniory had no individual title to it, nor any right, competent to them as individual beneficiaries, to control the administration of the land. The Indians belonging to the band resident upon the Seigniory had, on the other hand, contended that they possessed proprietary rights or at all events, indefeasible rights of occupation, by virtue of either an unextinguished aboriginal title or occupation sufficient to found a prescriptive title, or by virtue of an obligation created by the grants, statutes, and other documents relating to the Seigniory.

The appellants brought an action on the footing that they were the duly elected chiefs of a band of Indians residing on the land in question. By their declaration they claimed possession of the Seigniory, or at all events, of certain common lands comprised in it; or alternatively, that if the defendant ecclesiastics had a title to the Seigniory, such title was subject to a trust for the benefit of the plaintiffs and those whom they represented, such that the latter were entitled to the free use of the common lands free from interference.

Among the important documents in the case were certain grants from the King of France in 1717 and 1718, and in 1733 and 1735.

These grants, which were made to predecessors of the respondents, purported to convey to them land forming part of the Seigniory, with a full proprietary title, but on the condition that they should alter the situation of a certain mission they had founded among the Indians in the neighbourhood, and build a church and a fort for the security of the latter. The circumstances under which these grants were made, and the events which occasioned them, appeared in detail in the judgment of the Superior Court, and their Lordships did not think it necessary to refer to them in detail.

In 1841 the Legislature of Lower Canada passed an Act with a preamble referring to a controversy about the title of the Ecclesiasties of the Seminary, not relating, however, to the questions involved in the issues raised here. By section 1 they were declared to be a corporation. By section 2 their title to the

Seigniory was confirmed, and it was enacted that the corporation should hold as fully as their predecessors, but for certain purposes, objects and intents. These were to be the care of souls within the parish, the mission of the Lake of the Two Mountains, for the instruction and spiritual care of the Algonquin and Iroquois Indians, the support of a college at Montreal, the support of schools for children in the parish, and of the poor, invalids and orphans, the support and maintenance of the members of the corporation, its officers and servants, and the support of such other religious, charitable, and educational institutions as might, from time to time, be approved by the Governor of the Province, and for no other objects, purposes, or intents.

By section 14 the ecclesiastics were to lay accounts before the Governor of the province, and by section 15 they were, in respect of temporal matters, to be subject to visitation.

Their Lordships thought that the effect of this Act was to place beyond question the title of the respondents to the Seigniory, and to make it impossible for the appellants to establish an independent title to possession or control in the administration. They agreed with the learned Judges in the Courts below in thinking that neither by aboriginal title, nor by prescription, nor on the footing that they were *cestuis que trustent* of the corporation, could the appellants assert any title in an action such as that out of which this appeal had arisen. They agreed with the reasoning upon these points in the judgments of the Courts below.

They desired, however, to guard themselves against being supposed to express an opinion that there were no means of securing for the Indians in the Seigniory benefits which section 2 of the Act shewed they were intended to have. If this were a case which the practice of the English Courts governed, their Lordships might not improbably think that there was a charitable trust which the Attorney-General, as representing the public, could enforce, if not in terms, at all events *cy près*, by means of a scheme, or, if necessary, by invoking the assistance of the legislature.

Whether an analogous procedure existed in Quebec, and whether in that sense the matter was one for the Government of the Dominion, or of that of the Province, were questions which had not been, and could not have been, discussed in proceedings such as the present.

All their Lordships intended to decide was that, in the action in which the present appeal had arisen, the plaintiffs' claim was based on a supposed individual title which their Lordships held did not exist. If in some different form of proceeding, in which the Crown, as representing the interest of the public, puts the

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law in motion, or if negotiations are initiated for the settlement of a question as to the location of these Indians, which may be of importance to the general interests of Canada, their Lordships desired to make it clear that nothing they had now decided was intended to prejudice the questions which might then arise.

They would humbly advise His Majesty to dismiss the appeal. They gathered from what was said at the Bar that it was unnecessary for them to dispose of the costs.

Appeal dismissed.

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June 18.

STOCKS v. BOULTER.

Ontario Court of Appeal, Garrow, Maclaren, Meredith, and Magee, JJ.A., and Lennox, J. June 18, 1912.

1. FRAUD AND DECEIT (§ IV—16)—PURCHASE INDUCED BY FALSE STATEMENTS.

Where one was induced to purchase a farm, together with the stock and implements thereon, through false statements of the acreage knowingly made by the vendor, for the purpose of inducing the prospective purchaser to close the sale upon the vendor's assurance so given as to the quantity of land, and the purchaser is deceived by reliance thereon, the transaction will be set aside.

[*Stocks* v. *Boulter*, 3 O.W.N. 277, affirmed.]

2. FRAUD AND DECEIT (§ IV—16)—MISREPRESENTATION OF VENDOR—ABSTRACTING PART OF SUBJECT-MATTER.

It is ground for rescission of the sale of farm lands that the vendor planned a deception of the purchaser by retaining a portion of same consisting of 30 acres separated from the remaining 270 acres by a road, while representing by the advertisement of sale, and otherwise, that he was selling a farm of 300 acres, although the thirty acres was not specifically indicated to the purchaser as a part of what he was getting, if the latter relied upon the vendor's representation as to the quantity being 300 acres without suspicion of any shortage.

[*Stocks* v. *Boulter*, 3 O.W.N. 277, affirmed on appeal.]

3. ESTOPPEL (§ II G 2—102)—PURCHASE INDUCED BY MISREPRESENTATION—LACHES—OMISSION TO ASSERT CLAIM—DISCOVERY OF FRAUD.

It cannot be held that one who was induced to purchase land through fraud and misrepresentation, elected to abide by the sale, because of delay thereafter in suing for redress if the deception that had been practiced upon him was of such a character as to preclude the discovery of the fraud until the time of bringing the action.

4. CONTRACTS (§ V C 2—397)—CANCELLATION OF CONTRACT—FRAUD AND MISREPRESENTATION—RESTORATION OF BENEFITS.

The leasing of an orchard upon land the lessor had been induced to purchase by false representations, does not amount to such dealing with the property as will take away his right to rescind upon the ground of fraud, where the lease had been cancelled and the vendee was in a position to restore the land to the vendor practically as he received it.

[*Adam* v. *Newbiggin*, 13 App. Cas. 308, and *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218, referred to.]

5. FRAUD AND DECEIT (§ IV—16)—FINDINGS OF FRAUD—MEANING OF "OVERREACHED."

A finding in an action where the pleadings presented a question of actual fraud, that a vendee "was overreached" in a sale of land, and that the vendor "must or should have known that [his] representations were false" means that the vendor's representations were not merely false, but known by him to be false, and that he made them for the purpose of deceiving the vendee.

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Statement

APPEAL by the defendants from the judgment of Clute, J., *Stocks* v. *Boulter*, 3 O.W.N. 277, 20 O.W.R. 421.

The appeal was dismissed.

The judgment appealed from is as follows:—

Clute, J.

CLUTE, J.:—It is true that the plaintiff had the opportunity to inspect the farm, and to a certain extent did inspect the farm, assisted by McLaren; but I entertain no doubt, and find as a fact, that, so far as he is concerned, he commenced, continued, and concluded the negotiations in the belief of the truth of the representations contained in the advertisement and letter of the 6th October, 1910; that he had no suspicion that his acreage was being curtailed; that he accepted the statements of the number of apple trees, the condition of the farm, and the quantity of fall wheat, without question, having full confidence in the defendant.

I find that there was no such new bargain as the defendant now alleges, whereby the plaintiff knowingly consented to the exception in the agreement as impairing the quantity of land he was to get.

The defendant says he decided to make the exception five or six days before the plaintiff arrived. He admitted that the plaintiff came with the expectation of getting the full acreage. The defendant is uncertain as to when and where this new bargain was made. My view is, that he has forgotten much that was said at the time when the plaintiff went to see the farm on the 7th or 8th November; that, having shewn the plaintiff the limits of the land he conveyed, he has possibly persuaded himself or been persuaded into the belief that the plaintiff was willing to give up some 46 acres, out of a total of 300 acres without a word of protest and without any diminution in the price.

The plaintiff never supposed or had reason to suppose that the land south of the road formed any part of the farm. It is impossible to say that he would have accepted the farm at the price, even if this exception had been pointed out as included in the 300 acres, as it is of poor quality and worth but $10 an acre. It was not inspected by either the plaintiff or McLaren, as it doubtless would have been if they had not thought that the complement of land was complete without it.

It was the duty of the defendant, I think, having regard to all that had taken place before the plaintiff's arrival, to make

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it perfectly clear to him that a new deal was proposed, and what it was. This, I find, was not done. He was allowed to proceed on the assumption that the old deal was still on. The price had not been questioned; it was already settled. I find it impossible for me to accept the story now put forward of a new deal. I think the plaintiff knew or ought to have known that the statements made in the advertisements and letter of the 6th October, and his statement that the farm was clear and free of noxious weeds, were not true in many particulars. There was less than half of the complement of trees; there were not 200 acres seeded down; there was not 30 acres (but 20 acres) of fall wheat; there was 254 acres, instead of 300 acres; the farm was not in the highest state of cultivation, but was foul with herrick and yellow clover and other noxious weeds. The canning factory was not in "A1" order. Some of these are minor matters, as the quantity of land in fall wheat and seeded down and the condition of the factory, etc., and would not probably of themselves be sufficient to justify a cancellation of the agreement.

The three matters which, to my mind, were wholly misleading and of a nature to justify rescission, are the quantity of land, the number of apple trees, and the condition of the farm. At the time of the plaintiff's visit there was no evidence of weeds. They had been cut and burned or drawn into the barns with the hay. It appeared from the evidence that there were many tons of this stuff cut and treated as hay, which the plaintiff bought and paid for.

I reluctantly reach the conclusion that the plaintiff was overreached in the deal. The defendant had resided upon these premises all his life. He planted the orchard. He was living upon the farm when the advertisement was put out and the letter written. The letter of the 6th October was written in answer to a request for particulars, to be used in an endeavour to effect a sale. He must or should have known that the representations were untrue.

The law applicable to the present case may be found in the cases referred to in *McCabe* v. *Bell*, 15 O.W.R. 547, 1 O.W.N. 523. As pointed out in *Redgrave* v. *Hurd*, 20 Ch.D. 1, it is no defence to an action to rescind a contract induced by false representation, that the person to whom the representation was made had the means of discovering and might with reasonable diligence have discovered that it was untrue, or that he made a cursory and incomplete inquiry into the facts. If a material representation is made to him, he must be taken to have entered into the contract on the faith of it; and, in order to take away his right to have the contract rescinded, if it is untrue, it must be made to appear either that he had knowledge of the facts which shewed it to be untrue, or that he did not rely on the

representation. I think it clear from the evidence, giving it such weight as its credibility deserves, that the plaintiff's mind was not, prior to the contract, disabused of the untrue representations which were made, and that he relied upon them throughout the whole transaction.

The plaintiff, noticing a few spears of mustard near the buildings, was lulled into security by the assurances which he received.

With reference to the orchard, it is said that the plaintiff might have known that the number of trees represented were not there, or he might have counted them. Much more justly it may be said that the defendant ought to have known that they were there before he made the representation upon which the plaintiff was willing to rely and did rely. The representations made in the advertisement and letter of the 6th October were confirmed by what was said to the plaintiff on his visit to the farm. There can be no sort of doubt that the defendant intended the purchaser, whoever he might be, to act upon the representations made; and there is as little doubt in my mind that these representations were most material and produced on the plaintiff's mind an erroneous belief which influenced his conduct and induced him to purchase the farm.

Judging of the nature and character of the representations made, considered with reference to the object for which they were made, the knowledge or means of knowledge of the defendant in making them, and the intention which the law imputes to every man to produce those consequences which are the natural results of his acts, I think there was fraudulent misrepresentation within the principle laid down in *Smith* v. *Chadwick*, 9 App. Cas. 187, at p. 190, and *Brownlie* v. *Campbell*, 5 App. Cas. 925, at p. 950, and that a case for rescission is made out. See also *Arnison* v. *Smith*, 41 Ch.D. 348, 367; *Attwood* v. *Small*, 6 Cl. & F. 232, 330, 395. The same principle was acted upon after the conveyance was executed: *Attwood* v. *Small*, 6 Cl. & F. 232, at p. 396, and cases cited; *In re Reese River Silver Mining Co.*, L.R. 2 Ch. 604; *Wentworth* v. *Lloyd*, 10 H.L.C. 589; *Torrance* v. *Bolton*, L.R. 8 Ch. 118. As to completed contract, see *Jones* v. *Clifford*, 3 Ch.D. 779.

It is clear that the sale of the chattels was the result of the sale of the farm, and would not otherwise have been entered into. Both were included in the one agreement and should fall together.

The agreement of the 9th November and the deed and mortgage registered in pursuance thereof are set aside and cancelled. The plaintiff is entitled to a return of the purchase-money, both for the farm and chattels, with interest. In case the plaintiff cannot return all the chattels, by reason of sale or otherwise,

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the value of those not replaced, or a difference in value of those taking the place of chattels sold, to be allowed the defendant.

The plaintiff is to allow a reasonable sum for use and occupation of the canning factory. In case the parties differ about the same, it is referred to the Master at Picton to take an account: (1) of the value of those chattels not replaced and the difference in value of those chattels taking the place of chattels sold or otherwise disposed of by the plaintiff; (2) the claim for damages of the plaintiff in the pleadings mentioned by reason of the misrepresentations complained of, from which is to be set off a reasonable allowance for use and occupation by the plaintiff of the farm and chattels and of the cheese factory.

For the information of another Court, if the case should be carried further, and rescission of the contract is considered not to be the appropriate remedy, I assess the damages as follows:—

For shortage of acreage, 46 acres at $55 per acre	$2,530.00
For shortage in the number of trees. The defendant's witnesses stated that a bearing orchard like the plaintiff's was worth from $200 to $300 per acre. In 20 acres, if the trees were set 30 ft. apart, there would be 960 trees. Taking the lesser estimate, and making due allowance for the land without the trees, I assess the damages under this branch of the case at	3,100.00
For difference in value of land on account of its foul condition, and shortage of wheat crop, etc.	2,000.00
Or a total of	$7,630.00

The plaintiff is entitled to the costs of the action. Further directions and costs subsequent to judgment reserved.

The defendants appealed to the Court of Appeal from the above judgment.

A. W. Anglin, K.C., and *C. A. Moss*, for the defendants.
R. McKay, K.C., for the plaintiff.

Garrow, J.A.

GARROW, J.A.:—The plaintiff's case, as disclosed in the statement of claim, is, that the defendant Wellington Boulter had, by certain false and fraudulent representations, induced the plaintiff to purchase that defendant's farm in the township of Sophiasburg, in the county of Prince Edward, and the farm stock and implements thereon. The transaction had been completed and the purchase-money paid, a part in cash and the balance by a mortgage on the land to the defendant Nancy Helen Boulter, the wife of the defendant Wellington Boulter, and the plaintiff had been let into possession.

The defendant pleaded that all representations which had been made in the course of the transaction were true in substance and in fact; that, if they or any of them were false, the same were not false to the knowledge of the defendant Wellington

Boulter; and that, in any event, the plaintiff did not rely upon the representations, but upon the inspection and examination of the property made by himself and by others for him. The facts developed at the trial are very fully set out in the judgment and need not be here repeated at any length.

The issues were largely upon questions of fact; and, after hearing some forty witnesses, the learned Judge determined them all in favour of the plaintiff—properly, in my opinion.

In his judgment the learned Judge uses this language: "I think the plaintiff was a truthful witness. I entertain no doubt that his evidence is substantially true and accurate. I was also favourably impressed with Alexander McLaren and Peter Forin (witnesses called by the plaintiff). Where the defendant and his witnesses differ from the plaintiff and his witnesses, I think the latter are entitled to credit."

To interfere with a trial Judge's conclusion upon the facts, under such circumstances, would be as unsafe as it is, fortunately, unusual. Nor do I suggest that, if I had the power, I have any inclination to do so. On the contrary, I am of opinion, after a careful perusal of the evidence, and especially of that of the defendant Boulter himself, that the learned Judge's conclusions are entirely justified thereby.

The plaintiff was not a neighbour, but a Scotchman unaccustomed to Canadian farming, who was residing in British Columbia, when what may be called the negotiations began. He came east after seeing the advertisement, and the letter of October 6th, to see the 300 acre farm which had been offered for sale by the defendant Wellington Boulter, represented as having upon it certain stated quantities of seeded down and fall wheat land, and an orchard of 2,000 trees, also a canning factory in A1 order, and the farm land in the highest state of cultivation, for which the total price asked was $22,000. The plaintiff paid for the farm which he got, the $22,000, but he did not get 300 acres, but only about 255 acres, and the orchard had something less than one-half the number of trees stated, while the fall wheat land and the seeded down land each fell short of the quantities represented to about one-third. The farm was also infested with quantities of noxious weeds utterly inconsistent with the representation as to the state of cultivation and to its freedom from weeds, which had been made. And the canning factory was in anything but A1 order. Under these circumstances to absolutely deny the representations or that they were material was impossible. So the course of confession and avoidance adopted was the only one open under the circumstances.

The keynote, if I may call it so, to the whole transaction is, I think, the method by which the quantity of land, originally

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offered as 300 acres, was reduced. It appears that the plaintiff did not come forward at the time first arranged, but at a somewhat later date. The defendant, anxious for his own purposes to break the apparent continuity of the negotiations, speaks of the personal negotiations which took place after the plaintiff came east, as "a new deal," in the course of which, as he says, he withdrew from his original offer the parcel containing from 30 to 40 acres, which was divided from the rest by a road. But he made no corresponding reduction in his price; nor (it is, I think, perfectly clear, upon the whole evidence) did he make or attempt to make it clear to the plaintiff that the original offer had been so modified.

That this circumstance must have greatly impressed the learned Judge is, I think, apparent, if from nothing else, from the circumstance that the appeal-book contains about four printed pages of an examination of the defendant Wellington Boulter by the learned Judge, entirely devoted to an endeavour to ascertain, if possible, exactly at what stage in the negotiations the plaintiff was informed that he was getting the reduced acreage, while paying the full price. And the result of a perusal of it is to leave me, as it apparently left the learned Judge, under the strong impression that what was done was a carefully planned piece of deception, devised after the defendant saw the purchaser.

It is not necessary to discuss at any length the details of the other representations. Some of them from their nature, or rather the nature of the subject-matter, could have been conveniently tested by an ordinary examination; others of them such as the number of trees in the orchard might have been. The plaintiff might even have enquired among the neighbours as to the character of the farm weeds. But he did none of these. He and his friend Mr. Maclaren did, it is true, go over the land, but it is evident not for the purpose of making a critical examination, or to test the representations which the defendant had made.

So that the learned Judge's finding that the plaintiff relied upon the representations is amply borne out.

And it is no answer in itself to say as a defence that he had the opportunity to do so, unless it also appears that he was relying upon his own judgment, and not upon the representations. Nor is there, in my opinion, anything in the defendants' contention that the plaintiff had elected to abide by the purchase, or that he had so dealt with the property that rescission should not be awarded. When the deception appeared early in the following season, he at once became active in asserting his rights. He could not have been reasonably expected to do so earlier, because he was still in ignorance of the facts. In the meantime, he had made the lease of the orchard upon which the defendant relies; but

the lease has been cancelled, and the plaintiff is now in a position to restore the land, practically in the state and condition in which he received it. It is not every dealing with the property which will take away a plaintiff's right to rescission upon the ground of fraud: see *Adam* v. *Newbiggin*, 13 App. Cas. 308; *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218. The remedy is, of course, an equitable one in its origin, and involves the corresponding duty to do equity to the other side. This, however, only means such equity as the Court may regard as necessary substantially to restore the parties to their original positions.

Counsel for the defendants also contended that actual fraud is not specifically found by the learned trial Judge. This argument, however, seems to me to be not based upon a reasonable interpretation of the language of the judgment. In the course of his remarks, the learned Judge said:—

> I reluctantly reach the conclusion that the plaintiff was overreached in the deal. The defendant had resided upon the premises all his life. He planted the orchard. He was living on the farm when the advertisement was put out, and the letter written. The letter of 6th October was written in answer to a request for particulars to be used in an endeavour to effect a sale. He must, or should have known that the representations were false.

This language, whose mildness, perhaps, gives occasion for the argument, was doubtless employed from a humane impulse, to not unnecessarily hurt the feelings of a man of the age and apparent respectability of the defendant Wellington Boulter, but read in the light of the pleadings where the issue presented was plainly one of actual fraud, could only mean that the representations were not merely false, but false to the knowledge of the defendant, and were made for the purpose of deceiving.

"Overreach" in the Century Dictionary is given, as one of its meanings, to deceive by cunning, artifice, or sagacity: cheat: outwit." That the learned Judge had quite in mind the distinction between the nature of misrepresentations which are sufficient to justify rescission before, and those which must be established after, completion, is further made clear by the authorities to which he refers.

Finally, the defendant contends that the sale of the lands and chattels were separate transactions; but I agree with the learned Judge in thinking that they were not.

Even the defendant Wellington Boulter admits in answer to his own counsel as to the time when the purchase of the stock and implements was first spoken of, that he thought it was on the day they went to Picton to have the agreement of sale prepared saying, "he said, I want to buy all as a going concern, in fact I am going to buy lock, stock and barrel. . . ."

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In my opinion, the appeal should be dismissed with costs.

MACLAREN and MAGEE, JJ.A., and LENNOX, J., concurred.

MEREDITH, J.A.:—It seems to me to have been well proved at the trial that the plaintiff was induced to purchase the property in question by false statements as to very material facts made to him by the defendant for the purpose of inducing him to purchase, and made with full knowledge of their falseness; and that, I have no doubt, was the finding of the trial Judge, unhesitatingly reached, however it may have been expressed.

The abstraction of the 30 acres, or whatever the actual quantity may be, from the land offered, and the great difference between truth and assertion as to the orchard and as to the quality of the land, are things unexplainable and inexcusable, especially in dealing with one who was an entire stranger, not only in the locality, but indeed in this part of the Empire, and one who was brought into the transaction through the innocent interposition of a judicial officer of the locality, which might very well put him off his guard. They were not, in any sense, mere matters of opinion or of mere commendation; they were material and essential.

Nor can I find in the evidence anything sufficient to prevent a rescission of the contract on the ground of fraud; there could be no affirmance binding upon the plaintiff, in the absence of knowledge of such things as gave a right to rescind. The sale of the future produce of the orchard, made as it was, was not intended to be more than a personal contract, and it has been wholly annulled by the parties to it. There was no intention to make any election or to waive any right. But all this is immaterial, because damages have been assessed by the trial Judge at a reasonable amount, and the defendant prefers a rescission, which the plaintiff also prefers.

I would dismiss the appeal.

Appeal dismissed.

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LA BANQUE NATIONALE (plaintiff) v. A. JONCAS et al. (defendants), & L. O. NOEL (plaintiff en faux) v. LA BANQUE NATIONALE (defendant en faux).

Quebec Superior Court (District of St. Francis), Hutchinson, J. April 12, 1912.

1. EVIDENCE (§ III—372)—COPY OF NOTARIAL PROTEST AS EVIDENCE—ART. 1209, C.C. QUE.

A copy of a notarial protest of a promissory note in the form prescribed by sec. 125 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, in duplicate, is sufficient in an action on the note to prove the protest, where the repertory of the notary shews the regular protestation of the note, since, by art. 1209 of the Civil Code, the acts of notaries are declared to be authentic acts.

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2. Evidence (§ III—372)—Copy of notarial protest as evidence—Art. 1211 C.C. Que.

A copy of a notarial protest of a promissory note is sufficient evidence in an action on the note unless the defendant, as required by art. 1211 of the Civil Code, shews that the original protest never existed.

Panneton & Leblanc, for plaintiff *en faux*.
Campbell & Gendron, for defendant *en faux*.

Sherbrooke, April 12, 1912.

Hutchinson, J.

Hutchinson, J.:—The Court having heard the parties by their respective counsel on the merits of the inscription *en faux* made and filed herein by the said defendant, L. O. Noel, and having examined the proof and proceedings of record and deliberated:—

Whereas the present action is based on three promissory notes:

(1) One for $350.00, bearing date at Sherbrooke, the 22nd of February, 1907, made by defendant Joncas, and endorsed by the said defendant Noel, with interest and costs of protest;

(2) A promissory note for $400.00, bearing date at Sherbrooke, the 27th of March, 1907, made by defendant Joncas, and endorsed by defendant Noel, with interest and costs of protest;

(3) A promissory note for $300.00, bearing date at Sherbrooke, the 25th of April, 1907, made by defendant Joncas, and endorsed by the defendant Noel, with interest and cost of protest;

Whereas the defendant Noel duly appeared by his attorneys, and by petition asks to be allowed to inscribe *en faux:*

(1) Against the document purporting to be a copy of protest made by J. A. Archambeault, notary, on the 25th of April, 1907, under the No. 23,391 of his minutes at the request of the plaintiff at Sherbrooke, of a note signed by A. Joncas, and endorsed by L. O. Noel, and a document purporting to be a declaration of the procedure or *procès-verbal* of the proceedings in order to protest the said note; and a document purporting to be a copy of the notice of protest to the said L. O. Noel; and the minute of the said protest, *procès-verbal* and notice; and against the inscription of protest for non-payment of the said note inscribed on the back of the said note and signed by the said J. A. Archambeault, notary, which said copies make part of the exhibit No. 1 filed herein by plaintiff;

(2) Against the document purporting to be a copy of the protest made by J. A. Archambeault, notary, on the 30th of May, 1907, under the No. 23,466 of his minutes, at the request of the plaintiff at Sherbrooke of a note signed by A. Joncas, and endorsed by L. O. Noel, and against all the other documents applicable to this last-mentioned note as set forth and detailed respecting the said other note and protest thereof as above mentioned and under the said minute No. 23,391;

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(3) And against the document purporting to be a copy of the protest made by J. A. Archambeault, notary, on the 26th of June, 1907, under the No. 23,515 of his minutes, at the request of the plaintiff at Sherbrooke of a note signed by A. Joncas, and endorsed by L. O. Noel, and against all the other documents applicable to this last-mentioned note, as set forth and detailed respecting the said note and protest thereof as above mentioned and under the said minute of No. 23,391;

And, further, the said petitioner asks that the said plaintiff should declare within six days if it intended to make use of the documents inscribed against;

And whereas the said plaintiff (now defendant *en faux*) declared that it did intend to make use of the said documents;

Whereas the said plaintiff *en faux* thereupon asked that the Court do order the said documents above mentioned to be deposited in the office of this Court at the diligence of the defendant *en faux*, and that in default thereof, within the delay fixed, that the copies of the said protest filed in this cause as exhibits Nos. 1, 2 and 3 be rejected from the record;

Whereas judgment was rendered granting the first part of said motion asking that the original minutes inscribed against should be deposited in the office of this Court;

Whereas the said defendant *en faux* later declared that it was impossible to find the said minutes in the office of the said notary, J. A. Archambeault, whose *greffe*, by reason of his death, was now deposited in the office of the Prothonotary of the Superior Court for this District, although most careful and diligent search had been made, and the said defendant *en faux* further declared that it appears, however, in the repertory of the said notary Archambeault that the said three minutes have been entered and described under the Nos. 23,391, 23,466 and 23,515 as above mentioned;

That the said three documents filed herein as exhibits 1, 2 and 3 of the plaintiff are sufficient in themselves to make proof of the protests and notices respecting the said three notes, which form the basis of the present action, and that these three documents, as appear in the record, are complete in themselves, and fulfill all the conditions required by law respecting protest and notices, in order to hold responsible the endorser of the said notes, namely, the said L. O. Noel;

That the existence of the said three protests and notices in the *greffe* of the said notary is not necessary seeing that the three documents protested in the record independent of the production of the said minutes, constitute by themselves the protests and notices required by law;

That the fact they are certified as copies of the minutes is of no importance, especially seeing that they are declared over the signature of the same notary to be made *en double*, and to

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be of themselves original, making proof complete without reference to any minute in the *greffe* of the said notary, and that a notarial protest accompanied by the ordinary notice given to the endorser is made *en minute* or *brevet simple* or *en double*, and that the documents which are in the record may serve as a protest *en brevet simple* or *double;*

That the documents filed in the record are the only ones which have been delivered to the principal plaintiff by the said notary after the said protests were made, namely, the next or following day;

That the said principal plaintiff has always depended on the said documents filed as exhibits, as making complete proof of the protest and of the notices, and the defendant *en faux* contends that there is no need to refer to other documents than those in the record under the circumstances of the case, and even if the minutes of said protests and notices should not be produced, or should not exist, the said documents, exhibits 1, 2 and 3 of the plaintiff, should remain in the record as making complete proof and sufficient of the said three protests and notices in favour of the said principal plaintiff;

That the inscriptions which are on the back of the notes in question to the effect that the said documents, exhibits 1, 2 and 3 of the plaintiff, in order to serve the same ends and to make the same proof.

And the said defendant *en faux* prays that it be given *acte* of the fact that the minutes of the said three protests and notices cannot be found in the *greffe* of the said notary, or elsewhere, and that it is impossible to deposit them in the office of this Court, and that in consequence the parties in this cause and particularly the defendant *en faux* be exempt from depositing or causing to be deposited in the *greffe* of this Court the minutes of the said three protests and notices; and that the documents placed in the record and filed as exhibits 1, 2 and 3 of the plaintiff remain in the record to serve the purpose of this cause, under reserve of all rights of the parties, and that the inscriptions which have been made on the back of the said notes to the effect, that the said notes have been protested, remain also in the record, and that the said documents, exhibits 1, 2 and 3, serve the same ends, and that the cause be proceeded with and adjudicated on the inscription *en faux* of the defendant Noel, notwithstanding the non-production of the minutes, and that it may in consequence be ordered to the plaintiff *en faux* to produce and file his *moyens en faux* within six days from the judgment of the present motion.

Whereas the said motion was granted subject to all, and without prejudice to any, of the rights of the plaintiff *en faux;*

Whereas the said plaintiff *en faux* under reserve of his rights for *moyens* of inscription *en faux* says: That there is not and

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never was an original of the *minute en double* of the document purporting to be a copy of the protest made by the No. 23,391 of his minutes at the request of the defendant *en faux* at Sherbrooke of the note signed by A. Joncas to the order of the plaintiff *en faux*, and endorsed by the plaintiff *en faux*, and that the said document is not a copy of the original, neither of the double, nor of the minute or of any document whatever;

That there is not and never has been any original or minute or double of the document purporting to be a copy of the declaration and procedure or *procès-verbal* of the proceedings made in order to protest the said note;

That there has never been and there is no original or minute or double of the document purporting to be a copy of the notice of the said protest of the plaintiff *en faux;*

That the inscription of the protest for the non-payment of the said note made on the back of the said note, and signed by J. A. Archambeault, notary, is false; and that the said note has never been protested;

And the said plaintiff *en faux* make the same allegations in his said *moyens* as above mentioned respecting the said two other notes, protest and notices under the Nos. 23,466 and 23,515 of the minutes of the said notary;

That the said plaintiff *en faux* has never received a notice and protest of the said notes above mentioned;

That there has never been any other document made, either as original or in minute or *en double* of the said notary, J. A. Archambeault, concerning the said note other than in this cause filed;

And the plaintiff *en faux* prays that the pieces filed by the defendant *en faux* in the principal action, mentioned in the petition to be allowed to inscribe *en faux* be declared false, and that the inscription of plaintiff *en faux* be declared well founded, and that the exhibits filed by defendant *en faux* as Nos. 1, 2 and 3 be rejected from the record, and further prays that they form no part thereof, the whole with costs;

Whereas the said defendant *en faux* by its answer denies all the allegations set forth and contained in the said *moyens en faux* of the said plaintiff *en faux*, and prays that the said *moyens* or reasons be dismissed with costs;

Considering that the Bills of Exchange Act, ch. 119, of Revised Statutes of Canada (1906) governs as to promissory notes, and the protesting thereof, sec. 186 providing that the provisions of this Act relating to bills of exchange apply with the necessary modifications to promissory notes;

And sec. 122 of this Act provides that "A protest must contain a copy of the bill or the original bill may be annexed thereto, and the protest must be signed by the notary making it, and must specify:

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(*a*) The person at whose request the bill is protested;
(*b*) The place and date of protest;
(*c*) The cause or reason for protesting the bill;
(*d*) The demand made and the answer given, if any; or
(*e*) The fact that the drawee or acceptor could not be found.

Considering that by this section it is not required that the protest must be made in duplicate, but simply that it must be signed by the notary;

Considering, however, that by this Act, sec. 125, it is provided, that:

"The forms in the schedule of this Act may be used in noting or protesting any bill and in giving notice thereof";

Considering by form (*c*) under said schedule a copy of the note and endorsement thereon are included, and at the end of the said form of protest are the words, "protested in duplicate";

Considering that the said notary has followed the said form, ending with the words: "all of which I attest by my signature (*Le tout attesté sous mon seing*), protested *en double* under the No. 23,391 (respecting the first note and the other numbers already mentioned respecting the other two notes), then follows:

Signé, J. A. ARCHAMBEAULT.
Vraie copie de la minute en mon étude.
J. A. ARCHAMBEAULT.

Considering that if the said protest filed and certified by the said notary be true copies of the minutes in his *étude*, it is evident that the documents in his *étude* were signed by the said notary as the law required, and unless it is proved by the plaintiff *en faux* that they never existed, and that the copies of the protests filed are false, the said protests must be held to be good and sufficient;

Considering that the originals mentioned by said notary appear in regular order in the repertory of the said notary, and that the notarial protests were kept by themselves by the said notary in bundles, and sometimes even scattered on the floor of the vault where his documents were kept, and that several persons had access to this vault, and particularly so during some months which elapsed between the death of the said notary and the removal of the *greffe* of the said notary to the prothonotary of this Court at Sherbrooke;

Considering that under article 1208 of the Civil Code all *actes* of notaries are authentic acts, and article 1209 says that the notifications, summonses, protests and services may be made by one notary, and that these *actes* are authentic, and make proof of their contents until contradicted or disavowed (see *Choquette* v. *McDonald*, 19 Que. S.C., page 408);

Considering further, that article 1211 of the Civil Code provides that "authentic writings may be contradicted only by

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inscription *en faux*," but the burden of proof is upon the plaintiff *en faux* to prove what he alleges;

Considering that the plaintiff *en faux* has not proved that the document which the said notary declared remained in his *étude*, had no existence, nor is it proved that the said copies of protest filed and inscribed against, are false, nor that any of the other documents inscribed against is false, and, therefore, the documents filed as exhibits 1, 2 and 3 should be received and accepted as true, and as being as provided by law:—

Doth, therefore, dismiss the inscription *en faux* of the said plaintiff *en faux*, with costs.

Application dismissed.

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May 4.

FIDELITY TRUST CO. v. BUCHNER.

Ontario High Court. Trial before Riddell, J. May 4, 1912.

1. PARENT AND CHILD (§ III—19)—STATUS OF ADOPTED CHILD—ONTARIO LAW.

Parentage by adoption is not recognized by the laws of Ontario.

[*Re Davis* (1909), 18 O.L.R. 384, followed.]

2. BENEVOLENT SOCIETIES (§ III—10)—REGULATIONS—NAMING OF ADOPTED CHILD AS BENEFICIARY—PROOF OF ADOPTION.

Notwithstanding that the legal adoption of children is not recognized by the laws of Ontario, a mutual benefit association may provide for the payment of benefits to adopted children by a rule or regulation to the effect that they may be named in certificates of insurance as beneficiaries, upon proof of their legal adoption being made to the satisfaction of the Supreme Secretary of the society.

[*Ancient Order of United Workmen of Quebec* v. *Turner* (1904), 44 Can. S.C.R. 145, referred to.]

3. INSURANCE (§ IV B—170)—CHANGE OF BENEFICIARY—PREFERRED CLASS—ADOPTED CHILD—4 EDW. VII. CH. 15, SEC. 7.

An adopted child or grandchild of an insured person is not within the preferred class of beneficiaries mentioned in sec. 7 of ch. 15 of 4 Edw. VII.

4. INSURANCE (§ IV B—170)—DECLARATION NAMING BENEFICIARY—DEATH OF BENEFICIARY NAMED IN CERTIFICATE—R.S.O. (1897) CH. 203, SEC. 151, SUB-SEC. 3.

A sufficient declaration of beneficiary is created under R.S.O. 1897, ch. 203, sec. 151(3) by a statement written by an insured person, after the death of the beneficiary named therein, on a certificate of insurance issued by a mutual benefit association, to the effect that the benefit thereunder should be paid to a person "who for many years had advanced money to [the insured] and kept up the premiums, and who [was] a holder for value," notwithstanding such change of beneficiary was void under the rules of the association, since such rules must yield to the statute.

5. INSURANCE (§ VI D 2—395)—MUTUAL BENEFIT INSURANCE—DEATH OF BENEFICIARY PRIOR TO THAT OF ASSURED—NO NEW BENEFICIARY NAMED—FOREIGN SOCIETY—R.S.O. 1897, CH, 203, SECS. 147, 151, SUB-SEC. 3.

Where the beneficiary named in a certificate of insurance issued by a mutual benefit association incorporated under the laws of Massachusetts, did not survive the insured, upon the death of the insured

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without having named a new beneficiary, the proceeds of such insurance become a part of his estate under R.S.O. 1897, ch. 203, secs. 147 and 151 (3), and are not payable according to the rules and regulations of the association, as prescribed by R.S.O. 1897, ch. 211, sec. 12, since the latter Act is applicable only to associations incorporated under its provisions.

[*Gillie* v. *Young* (1901), 1 O.L.R. 368, specially referred to; *Mingeaud* v. *Packer* (1891), 21 O.R. 267, affirmed on appeal by an equally divided Court; *Mingeaud* v. *Packer* (1892), 19 A.R. 290, and *Re Harrison* (1900), 31 O.R. 314, referred to.]

Statement

ISSUE as to certain moneys paid into Court by a benefit society.

April 29. The issue was tried before RIDDELL, J., without a jury, at London.

W. G. R. Bartram, for the plaintiffs.

J. M. McEvoy, for the defendant.

Riddell, J.

May 4. RIDDELL, J.:—T. R. Rhoder, a manufacturer in a small way in London, took out, on the 29th August, 1901, a certificate in the Royal Arcanum, whereby that organisation agreed "to pay . . . to Lucy Hendershot (adopted daughter) a sum not exceeding $1,500 in accordance with and under the laws governing said fund, upon satisfactory evidence of the death of said member . . . provided that said member is in good standing at the time of his death, and provided also that this certificate shall not have been surrendered by said member and another certificate issued at his request, in accordance with the laws of the Order." (Considerable argument was based upon the clause "in accordance with the laws of the Order," but it is clear that these words refer simply to a certificate subsequently to be issued, and that they have no relevance in the present inquiry.)

Lucy, having been married to W. P. Hendershot, died in 1909, leaving her surviving four infant children and her husband. Thereafter, Rhoder made the following endorsement upon the certificate:—

"The within named beneficiary, Lucy Hendershot, having died, I direct that all benefits under the within certificate be paid to Urban A. Buchner, who for many years has advanced money to me and kept up the premiums, and who is a holder of this certificate for value.

"Witness my hand and seal this 6th day of July, 1909.

"Witness:

"M. Isabel Blankinship. Thomas R. Rhoder. (L.S.)"

Rhoder died a widower and childless in 1911; a claim was made by Buchner that he was entitled to the amount of the insurance—a claim was, however, made on behalf of the children of the deceased "adopted daughter." The Royal Arcanum paid the money into Court; the Fidelity Trust Company took out

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letters of administration with the will annexed of the estate of the deceased Rhoder; and, upon application, an interpleader order was made by the Master in Chambers.

The issue came on for trial before me at the non-jury sittings at London during the present week—I heard all the evidence and reserved judgment.

Every suggestion of amendment to the form of the issue was strenuously combatted by counsel for the plaintiffs; and I must accordingly deal with the issue exactly as I find it.

In the issue the Fidelity Trust Company are plaintiffs and Buchner defendant.

"The plaintiffs affirm and the defendant denies: (1) that . . . infant children of Lucy Hendershot . . . are the designated preferred beneficiaries of their grandfather . . . T. R. Rhoder by certificate . . . issued by . . . the Royal Arcanum . . ; (2) that the plaintiffs, as next friend to the said infants, . . . are entitled to payment out of Court of the said sum; (3) that, in the alternative, . . . the plaintiffs, as administrators . . . of . . . T. R. Rhoder, are entitled to the said sum, notwithstanding the endorsement dated the 6th day of July, 1909, on the said certificate, in favour of the said defendant, in that the said endorsement was not read to or by the said T. R. Rhoder, and was ignored and treated as null and void by both the said T. R. Rhoder and the said defendant until the death of the said T. R. Rhoder. . . . And the defendant affirms and the plaintiffs deny: (1) that the said defendant is the owner of the . . . certificate and entitled to the proceeds . . . paid into Court by virtue of the fact that the said insurance certificate is personal property reduced into possession by the defendant, and owned by him as an innocent purchaser for value, and by virtue of an endorsement upon the said certificate made by T. R. Rhoder to . . . Buchner for value; (2) that the defendant is entitled to the said sum paid into Court as the proceeds of the said certificate."

The claim on behalf of the infants is based upon the rules of the society. Section 332 says: "In the event of the death of all the beneficiaries designated . . . before the decease of such member, if he shall have made no other or further disposition thereof, as provided in the Laws of the Order, the benefit shall be disposed of as provided in section 330. . . ." As sec. 326 provides that a certificate shall not be made payable to a creditor, or be held or assigned in whole or in part to secure or pay any debt which may be owing by the member; and sec. 327 provides that any assignment of a benefit certificate by a member shall be void: it is argued for the plaintiffs that the member has not made a disposition "as provided in the Laws of the Order," and, consequently, by the provisions of sec. 332, sec. 330 applies. This

is as follows: "If at the time of the death of a member . . . any designation shall fail for illegality or otherwise, then the benefit shall be payable to the person or persons mentioned in class first, sec. No. 324, if living, in the . . . order of precedence by grades as therein mentioned, the persons living of each precedent grade taking in equal shares *per capita*, to the exclusion of all persons living of subsequent enumerated grades, except that in the distribution among persons of grade second the children of deceased children shall take by representation the share the parent would have received if living. . . ."

Section 324: "A benefit may be made payable to any or more persons of any of the following classes only:—

"Class First.

"Grade 1st.—Member's wife.

"Grade 2nd.—Member's children and children of deceased children and member's children by legal adoption.

"Grade 3rd.—Member's grandchildren."

(Enumerating 13 grades.)

"In either of which cases, no proof of dependency of the beneficiary designated shall be required; but in case of adoption, proof of the legal adoption of the child or the parent designated as the beneficiary, satisfactory to the Supreme Secretary, must be furnished before the benefit certificate can be issued.

"Class Second.

"(1) To the affianced wife . . ."

(Enumerating five grades.)

If (*a*) the deceased Mrs. Hendershot was the member's child "by legal adoption," within the meaning of grade second of class first in sec. 324; (*b*) the member did not make any "other or further disposition" of the certificate, "as provided in the Laws of the Order;" and (*c*) the provisions of the Laws of the Order are to prevail—it is, to my mind, clear that the children are entitled to the money.

It is argued by the defendant that Lucy Hendershot was not a child "by legal adoption."

In *Re Davis* (1909), 18 O.L.R. 384, at pp. 386, 387, it is said, "The law of England, strictly speaking, knows nothing of adoption;" and "parents cannot enter into an agreement legally binding to deprive themselves of the custody and control of their children; and, if they elect to do so, can at any moment resume their control over them." In *Re Hutchinson** (1912), 26 O.L.R. 113, at p. 115, apparently doubt is cast upon these propositions—and it is suggested that the decision in *Re Davis* was as it was

*The judgment of the Chancellor in *Re Hutchinson* was reversed by a Divisional Court on the 25th June, 1912: 3 O.W.N. 1552.

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because the attention of the Court was not directed to the Act 1 Geo. V. ch. 35, sec. 3, taken from R.S.O. 1897, ch. 340, sec. 2. Of course, 1 Geo. V. ch. 35 had not been passed when *Re Davis* was decided: but the statute from which it was ultimately derived had been in force in England for two hundred and fifty years and in our country since Upper Canada became a Province, if not before: *Anon.* (1858), 6 Gr. 632; *Davis* v. *McCaffrey* (1874), 21 Gr. 554; and other cases. It has not given occasion for many decisions in Upper Canada; but the law is of every day application.

Our statute is derived from 12 Car. II. ch. 24, sec. 8, and carries the law no further than that statute. The effect of the statute is not (I speak with great deference) to take away any of the rights of the father, but to enable the father to take away the common law rights of others—it does not exclude the right of the father himself, but that of "all and every person or persons claiming the custody or tuition of such child or children as guardian in socage, or otherwise." And, accordingly, as Lord Esher says in *The Queen* v. *Barnardo* (1889), 23 Q.B.D. 305, at pp. 310, 311, "The parent of a child, whether father or mother, cannot get rid of his or her parental right irrevocably by such an agreement. . . . As soon as the agreement was revoked, the authority to deal with the child would be at an end."

The statute is considered in Blackstone, vol. 1, p. 362; Co. Litt. 88(*b*), and Hargrave's notes; Eversley, 3rd ed., pp. 618, 619, 620, 622, 646, 743, 744; Simpson, 3rd ed., pp. 95, 105, 111, 113, 183, 184, 186, 188 *sqq.* And I do not find any case or text in which it has been thought that the statute applied except after the death of the father.

The ordinary rule is, that there cannot be a guardian in the lifetime of the father: *Ex p. Mountfort* (1808), 15 Ves. 445; *Barry* v. *Barry* (1828), 1 Molloy 210; *Davis* v. *McCaffrey*, 21 Gr. at p. 562.

But, not to press that point, a deed under the statute has been called by Lord Eldon, L.C., "only a testamentary instrument in the form of a deed:" *Ex p. Earl of Ilchester* (1803), 7 Ves. 348, at p. 367. Such a deed has been held, from within a few years of the passing of the statute, to be revocable even by a will.

In *Shaftsbury* v. *Hannam* (1677), Finch's Reports (not Finch's Precedents) 323, the dispute was between the plaintiffs, claiming under a deed poll, and the defendant, claiming under a subsequent will. The Lord Chancellor, Lord Nottingham, held that the widow seemed to have a great probability of law on her side, and refused to disturb her in her guardianship, unless she refused to prove that she was not excluded by the terms of the statute (referring to difference of religion—now of no consequence, and, happily, but of interest historically).

In *Lecone* v. *Sheires* (1686), 1 Vern. 442, Lord Jeffreys, L.C., would not allow the removal of a guardian appointed by deed, where the deed contained a covenant not to revoke, and the deceased parent had died in debt to the guardian so appointed.

In *Ex p. Earl of Ilchester*, 7 Ves. 348, Lord Eldon, L.C., says (p. 367): "The question takes this turn; whether, as it is necessary under the statute, that the instrument, whether a deed, which I take to be only a testamentary instrument in the form of a deed, or a will, should be executed in the presence of two witnesses . . . it is therefore also necessary, that any instrument revoking that shall be executed in the presence of two witnesses. . ." Thus making no distinction between the case of a deed and of a will, either being revocable.

I cannot find any contrary intimation or suggestion of opinion as to the meaning and effect of the statute. See also I Cyc. 917.

The English law is substantially the same as ours, and the decisions there are of authority with us—and I am unable to recant the opinion, expressed in *Re Davis*, that the law of Ontario, strictly speaking, knows nothing of adoption. As the Chancellor has not actually decided to the contrary, I am at liberty to follow my own judgment.

It follows that in Ontario there can be no "legal adoption," in the strict and proper use of the words, as there can be in many of the States of the Union: 1 Cyc. 918. The Royal Arcanum is an organisation which covers many of the United States, as well as Canada; and its rules are made of general application.

No doubt, it was in view of the difficulty of framing any general rule as to "legal adoption" that the determination of the fact of "legal adoption" was left to the Supreme Secretary (sec. 324), and the provision was made that the proof of legal adoption was to be satisfactory to the Supreme Secretary. In my view, the Supreme Secretary was made the judge as to "legal adoption"—particularly in a country where "legal adoption" has no meaning in the proper use of the words. I think his decision is final. In our Province, I think that what the Supreme Secretary decides to be "legal adoption" is "legal adoption" for the purposes of the insurance—no statute or other law of the Province being violated.

As the benefit certificate cannot be issued until the Supreme Secretary is satisfied, it must be taken that the Supreme Secretary has decided that Lucy Hendershot was the adopted daughter, or to use the words of the rules, the child by legal adoption, of the member: *Ancient Order of United Workmen of Quebec* v. *Turner* (1910), 44 Can. S.C.R. 145.

(*b*) I think it equally clear that Rhoder made "no other or further disposition thereof as provided in the Laws of the Order;" sec. 327 makes an assignment void, and sec. 326 declares that a certificate is not to be held or assigned to secure or

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pay any debt; and the provisions of sec. 333, permitting a change of beneficiary to be effected by surrender of certificate and payment of a small fee, have not been taken advantage of.

(*c*) The defendant appeals to the Act of 1904, 4 Edw. VII. ch. 15, sec. 7: but that has no application —it applies only in the case of preferred beneficiaries—husband, wife, children, grandchildren, or mother: R.S.O. 1897, ch. 203, sec. 159; and adopted children are no more "children" than are godchildren, or than the "wife" in *Crosby* v. *Ball* (1902), 4 O.L.R. 496, or *Decre* v. *Beauvais* (1906), 7 Q.P.R. 448, was a wife.

The statute to apply is R.S.O. 1897, ch. 203, sec. 151(3): "The assured may designate . . . the beneficiary . . . and may . . . by the . . . like instrument from time to time . . . alter . . . the benefits . . . or substitute new beneficiaries . . . ." (6) "And if all the beneficiaries die in the lifetime of the assured . . . the insurance money shall form part of the estate of the assured." This is applicable to the Royal Arcanum: sec. 147. The Royal Arcanum is not a society incorporated under R.S.O. 1897, ch. 211 (an Act respecting Benevolent, Provident, and other Societies), so as to be entitled to pay the insurance money "to the person or persons entitled under the rules thereof:" ch. 211, sec. 12. The incorporation was in Massachusetts in 1877, under the provisions of the laws there in force, substantially as in ch. 115 and ch. 106 of the Public Statutes, 1881.

Its position is, therefore, in the view of our law, the same as that any other insurance company—*e.g.*, that of the Catholic Order of Foresters in *Gillie* v. *Young* (1901), 1 O.L.R. 368. That case decides that the rules of the "Order" must give way to the provisions of the statute so far as they are inconsistent therewith. *Mingeaud* v. *Packer* (1891), 21 O.R. 267, S. C. (1892), 19 A.R. 290, and *Re Harrison* (1900), 31 O.R. 314, may also be looked at.

If, then, the declaration endorsed on the certificate has any validity, the plaintiffs must fail in the issues offered by them.

The grounds of attack upon the endorsement are, it will be seen, two in number: (*a*) that the endorsement was not read to or by Rhoder; and (*b*) that it was ignored and treated as null and void by both Rhoder and the defendant until the death of Rhoder.

As to (*a*), there is not the slightest evidence that Rhoder did not fully understand what he was signing; he has signed his name legibly, and nothing indicates illiteracy in any way; letters, indeed, are produced, written by him, shewing the reverse. The second ground is equally baseless: considerable testimony was given indicating that the policy was transferred rather by way of security for a loan or series of loans than the reverse, but nothing suggests, much less proves, that the transfer "was ignored" or "treated" as "null and void."

The above will dispose of the issues offered in the plaintiffs' claim:—

(1) The infants are not "the designated preferred beneficiaries of their grandfather . . . T. R. Rhoder," for the double reason that they are not "preferred beneficiaries" at all, within the meaning of the statute, T. R. Rhoder not having been their grandfather in a legal sense; and, second, he made a new beneficiary under the provisions of the law in that regard.

(2) "The plaintiffs as next friend to the said infant children" are not "entitled to payment out of Court of the said sum" for several reasons. Assuming (what I by no means concede) that this company can be a next friend at all (R.S.O. 1897, ch. 206, secs. 4, 5, 8; *Nalder* v. *Hawkins* (1833), 2 My. & K. 243), (*a*) the next friend is not entitled to the infants' money: *Vano* v. *Canadian Coloured Cotton Mills Co.* (1910), 21 O.L.R. 144; he is brought into Court simply to protect the infants' rights and guarantee the costs: *Dyke* v. *Stephens* (1885), 30 Ch. D. 189, at pp. 190, 191; *Smith* v. *Mason* (1897), 17 P.R. 444; and (*b*), the infants are not entitled to the money in any case.

(3) The plaintiffs basing their claim to the money specifically "in that the endorsement was not read," etc., and "was ignored," etc., they fail upon this issue as well.

This by no means disposes of the whole matter. The evidence convinces me that, while the transfer is absolute in form, it was in fact but security for advances already made and to be made. The defendant says that he advanced more than the amount paid into Court; and I think I should not order a reference unless the plaintiffs assume the responsibility of asking for one. The cross-examination of the defendant was not apparently directed to shewing that he had not advanced the amount he claimed. The plaintiffs as administrators would be entitled to the proceeds of the certificate less the amount advanced, etc.

If, within ten days from this date, the plaintiffs apply for an order of reference, such order may go, at their peril as to costs, referring it to the Master at London to determine the amount for which the certificate is security in the hands of the defendant. In that event, I shall reserve to myself the question of costs and further directions until after the Master shall have made his report. If such an order be not taken out by the plaintiffs, I now find all the issues in favour of the defendant, direct the plaintiffs to pay all the costs over which I have control, and order the payment out to the defendant of the amount paid into Court.

Judgment accordingly.

[The plaintiffs accepted the reference offered in the judgment; and an order was accordingly made referring it to the Master at London to inquire and report upon the amount for which the insurance certificate and the assignment thereof were security.]

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FARMERS BANK v. HEATH.
(Decision No. 1.)

Ontario High Court, Cartwright, M.C. February 15, 1912.

1. APPEARANCE (§ 1—5)—CONDITIONAL APPEARANCE—SERVICE EX JURIS—FACTS ON WHICH JURISDICTION DEPENDS IN QUESTION.

Where, in an action on an insurance policy, the defendant moves to set aside an order allowing service out of the jurisdiction, and it appears doubtful whether the contract was made within or without the territorial jurisdiction of the Court or whether the alleged breach took place within the jurisdiction, the proper course is to let the order stand, and to give leave to the defendant to enter a conditional appearance.

[*Burson* v. *German Union Ins. Co.*, 10 O.L.R. 238, 3 O.W.R. 230, 372; *Canadian Radiator Co.* v. *Cuthbertson*, 9 O.L.R. 126; *Blackley Ltd.* v. *Elite Costume Co.*, 9 O.L.R. 382, and *Kemerer* v. *Watterson*, 20 O.L.R. 451, followed.]

Statement

THESE were two actions on two policies of Lloyds, made on the 11th January, 1909, and 1910, respectively, insuring the plaintiffs against losses arising from the wrongful acts of their employees.

The plaintiffs obtained the usual orders for service on the forty or forty-one defendants in London, England; and these defendants now moved to have the orders and services made thereunder set aside, as having been allowed without sufficient grounds.

Shirley Denison, K.C., for the defendants.

M. L. Gordon, for the plaintiffs.

The Master.

THE MASTER:—The first policy is for £5,145 sterling, the equivalent at $4.86 of $25,000, as noted on the margin of this 1909 policy, under or after the seal. The second is for £5,000 only. These policies were admittedly made in London and are similar in their terms, with one exception. In the 1910 policy there is an express provision that the loss, if any, is payable in Toronto. This, of course, at once disposes of the motion in that action, with costs to the plaintiffs in any event. It is only fair to state that Mr. Denison had been told by his clients that the policies were similar in all respects. As this second action must, therefore, be tried here, and all the evidence will be found here, it may be that the defendants will prefer to have both actions tried here and at the same time. In this way expense would be saved. But, in case they do not think it for their interest to take this course, then I think that the only disposition that is to be made of the motion in the 1909 case is to allow the defendants to enter a conditional appearance, in the form in which the same was allowed in the case of *Burson* v. *German Union Insurance Co.*, 3 O.W.R. 230, 372. In the result, as shewn in 10 O.L.R. 238, the plaintiff failed to shew any cause of action arising within Ontario, and his action was, on that ground, dismissed with costs.

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A similar course was approved of in *Blackley* v. *Elite Costumes Co.*, 9 O.L.R. 382, and *Nixon* v. *Jamieson*, 18 O.L.R. 625. This latter case resembles the present, in that the contract was silent as to the place of payment, though there "the course of business had invariably been for the respondent (plaintiff) to draw on the appellants (defendants) at sight for his commission and for the appellants to accept and pay the drafts in Scotland:" per Meredith, C.J., at p. 627.

This was also the course adopted by the same learned Chief Justice in *Kemerer* v. *Watterson*, 20 O.L.R. 451, which is, I think, the latest case on the point. There the leave to enter a conditional appearance was granted because it was in doubt whether, if the contract was made in Quebec, payment was nevertheless to be made in Ontario. The decision of the Chancellor in *Canadian Radiator Co.* v. *Cuthbertson*, 9 O.L.R. 126, was expressly approved of by Meredith, C.J., in Kemerer's case, supra, at p. 454.

In view of the facts of this case and of the above authorities, I have not thought it useful or necessary to discuss the grounds urged in support of the motion by Mr. Denison, in his full and clear argument, which may hereafter enable him to get at least the same measure of success as the defendants secured in *Burson* v. *German Union Insurance Co.*, *supra*, [10 O.L.R. 238].

The defendants may satisfy the Court, on a full consideration of the case at the trial, that payment was to be made in London under these policies, unless there is an express agreement to the contrary, as is found in the policy for 1910, which was only for £5,000, and not for £5,145, the amount secured by the one now in question. But this requires evidence which cannot be given or considered on an interlocutory application.

The motion is dismissed; costs in the cause.

Motion dismissed.

FARMERS BANK v. HEATH.
(Decision No. 2.)

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Ontario High Court, Clute, J. March 1, 1912.
Ontario Divisional Court, Falconbridge, C.J.K.B., Britton, and Sutherland, JJ. March 19, 1912.

1. APPEARANCE (§ I—5)—CONDITIONAL APPEARANCE—WHERE THERE IS DOUBT AS TO WHERE CONTRACT WAS MADE AND BREACH OCCURRED.

Where, in an action on an insurance policy, the defendant moves to set aside an order allowing service out of the jurisdiction, and it appears doubtful where the contract was made and the alleged breach took place, the proper course is to let the order stand, and give leave to the defendant to enter a conditional appearance.

[*Canadian Radiator Co.* v. *Cuthbertson*, 9 O.L.R. 126; *Blackley Ltd.* v. *Elite Costume Co.*, 9 O.L.R. 382; and *Kemerer* v. *Watterson*, 20 O.L.R. 451, followed; *Farmers Bank* v. *Heath* (No. 1), 5 D.L.R. 290, 3 O.W.N. 682, affirmed on appeal.]

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2. EVIDENCE (§ II L—348a)—PRESUMPTION AS TO WHERE PAYMENT OF INSURANCE MONEY IS TO BE MADE—MARGINAL NOTE ON POLICY.

The fact that an insurance policy, issued by underwriters in England, is stamped with the name of an agent in Toronto, and bears a marginal note shewing the equivalent in Canadian currency of the face value of the policy, is an indication that it is payable in Ontario.

APPEAL by the defendants from the order of the Master in Chambers, *Farmers Bank* v. *Heath* (*No.* 1), 5 D.L.R. 290, 3 O.W.N. 682, 21 O.W.R. 283, in one of the actions only, that upon the 1909 policy.

Shirley Denison, K.C., for the defendants.

M. L. Gordon, for the plaintiffs.

Clute, J.

CLUTE, J. (at the conclusion of the argument):—I think the proper disposition of this matter is that which was made by the Master, following *Kemerer* v. *Watterson*, 20 O.L.R. 451. I think there is sufficient doubt in regard to the question as to where the contract was made, and as to where the breach occurred, to justify the plaintiffs in bringing the action to have that question tested and to have a conditional appearance entered by the defendants, if they so desire: and I repeat what I said during the argument, that, if the facts are as suggested by counsel upon both sides, they might well have been spread out in form so that the Court could have acted upon them. I do not feel bound to act upon the documents above as they appear here; and, taking the insurance policy, issued apparently in London, to my mind it is obviously issued upon a form which shews that there was some person to whom the defendants were issuing it, and upon which they recognise that person as doing business in Toronto. Apparently, after it had been issued on the 20th January, 1909, in London, it passed to this person on the 8th February, 1909, in Toronto. Was that person the agent of the company of Lloyds? Or was he an agent of the bank? I do not know; but, upon the document issued by them, they recognised such a person. The natural inference was, that he was an agent of the defendants. That, of course, might be rebutted by the fact; and counsel for the defendants suggests that the fact is contrary to the inference I draw from the document itself; but that denial is not in such form that I can act upon it.

As I entertain a doubt as to where the contract was made or where the breach occurred, I think the proper order to make is that made in this case by the Master.

The appeal will be dismissed with costs to the plaintiffs in any event.

Middleton, J.

On the 12th March, 1912, an order was made by MIDDLETON, J., in Chambers, allowing the defendants to appeal to a Divisional Court from the order of CLUTE, J.

The appeal was dismissed.

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Shirley Denison, K.C., for the defendants.
J. Bicknell, K.C., and *M. L. Gordon*, for the plaintiffs.

The judgment of the Court was delivered orally, at the close of the argument, by FALCONBRIDGE, C.J.:—We are all agreed that Mr. Denison has presented this appeal with great skill and ingenuity. We are further agreed that it is neither necessary nor desirable that we should reserve the case merely for the purpose of adding to the literature on the subject.

The decision which we arrive at is not at all founded on the apparent hardship of the plaintiffs having to pursue individual underwriters into all the financial centres of Europe. It is based on what we consider the clear view of the law and practice.

There are two policies here, as to one of which the defendants admit that they have to submit to the jurisdiction of the Ontario Courts. As to the other one—it is for £5,145, which, by a written marginal note is declared to be equivalent to $25,000, the £1 sterling being taken at $4.86, the marginal note reading as follows, "£5,145 at ex. 4.86=$25,000"—counsel for the defendants has endeavoured to persuade us that there is no contract to pay this one in this country.

Two judicial officers have exercised their discretion on this motion, and, in our opinion, rightly. It seems to us that the cases of *Canadian Radiator Co.* v. *Cuthbertson*, 9 O.L.R. 126, *Blackley Limited* v. *Elite Costume Co.*, 9 O.L.R. 382, and *Komerer* v. *Watterson*, 20 O.L.R. 451, govern.

Not only is it a matter of doubt as to whether this contract is to be performed in Ontario, but I should think, without saying anything to prejudge the issue, it is quite arguable that the order appealed from is right: (1) by reason of the marginal note in the policy, which I have already referred to; and (2) from the fact that it is stamped with an agent's name, as referred to by Mr. Justice Clute. It is also suggested that the defendants have property in this country. However this may be, there is so much doubt in the case that the matters should be tried out in the cause, and not simply on affidavits. The practice is in substitution of the old common law practice requiring the plaintiff to undertake to submit to a nonsuit unless he proved a cause of action arising within the jurisdiction.

Appeal dismissed with costs to the plaintiffs in any event.

Appeal dismissed.

B.C.

HUMPHREYS v. CITY OF VICTORIA.

C. A. 1912

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Galliher, JJ.A. June 4, 1912.

June 4.

1. ARBITRATION (§ III—17)—ERROR IN AWARD—POWER OF COURT TO ALTER OR AMEND—EMINENT DOMAIN.

Where arbitrators appointed under sec. 396 R.S.B.C. 1911, ch. 170, to ascertain damages for land taken for a public street, award interest at 7 per cent. instead of 5 per cent. as allowed by statute, the Court cannot, upon the award coming before it on a motion to set the same aside, alter or amend the same to cure such error by accepting the respondent's abandonment of the excess, but must order the award set aside.

[*Skipworth* v. *Skipworth*, 9 Beav. 135, followed.]

Statement

AN appeal by the city of Victoria, from the decision of Gregory, J., refusing to set aside an award made in favour of Caroline Humphreys.

The appeal was allowed and the award set aside.

F. A. McDiarmid, for the city of Victoria, appellant.

T. Fell, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A., concurred with Galliher, J.A.

Irving, J.A.

IRVING, J.A.:—I would allow this appeal. The arbitrators seem to have been influenced by a desire to do what in their opinion would be a fair and just arrangement between the parties, and in so doing they neglected to pay strict attention to the statute.

Section 394 of the Municipal Act, R.S.B. 1911, ch. 170,* lays down exactly what the arbitrators are to consider, and a mistake by them as to the scope of the authority conferred upon them by that section, whereby they exceed their authority, constitutes a ground to set aside the award under sec. 40 of the

*Section 394, R.S.B.C. 1911, ch. 170, is as follows:—

394. The corporation of every municipality shall make to the owners or occupiers of, or other persons interested in, real property entered upon, taken, or used by the corporation in the exercise of any of its powers, or injuriously affected by the exercise of any of its powers, due compensation for any damages (including the cost of fencing when required), necessarily resulting from the exercise of such powers beyond any advantage which the claimant may derive from the contemplated work; and any such claim for compensation, if not mutually agreed upon, shall be decided by three arbitrators to be appointed as hereinafter mentioned, namely:—

(*a*) The municipality shall appoint one, the owner or tenant or other person making the claim, or the agent, shall appoint another, and such two arbitrators shall appoint a third arbitrator within ten days after their appointment; but in the event of such two arbitrators not appointing a third arbitrator within the time aforesaid, one of the Judges of the Supreme Court shall, on application of either party by summons in Chambers, of which due notice shall be given to the other party, appoint such third arbitrator.

Municipal Amendment Act, 1912,* or under sec. 14 of the Arbitration Act, ch. 11, R.S.B.C. 1911.†

In an old case decided in 1564, *Anon.*, reported in Dyer's Report, part 2, 242*a*., the submission was as to the right, title, interest and possession of certain land called K. The award instead of dealing with the matters submitted, provided that the defendants should have "the brakes there growing during his life, paying to the plaintiff annually two shillings for the moiety of the royalty of the said brakes."

The mistake of the arbitrators in that case seems very like the mistake in this award, and was held sufficient reason for setting aside the award.

The allowance of interest at 7% instead of at 5% is also objectionable.

I think the award should be set aside and the matter remitted to the arbitrators for reconsideration, under the amendment of 1912: see *Quilter* v. *Mapleson* (1882), 9 Q.B.D. 672.

GALLIHER, J.A.:—This is an appeal from the judgment of Gregory, J., refusing to set aside an award for $8,126.23 in favour of Caroline Humphreys. Galliher, J.A.

The city of Victoria under by-law No. 893 of the said city, expropriated certain lands, the property of Caroline Humphreys for street purposes, and being unable to agree as to the remuneration to be paid, the matter was referred to arbitration under section 396, R.S.B.C. 1911, ch. 170.‡

The award was attacked on several grounds, but the only one argued before us was that the arbitrators had proceeded upon a wrong principle in arriving at the amount of compensation to be paid (*a*) in that they allowed interest upon the amount

*Section 40 of the Municipal Amendment Act of B.C., 2 Geo. V., ch. 25 is as follows:—

40. Section 396 of said chapter 170 is hereby amended by adding at the end thereof the following:—

"Provided that in all cases of reference to arbitration under this Act, the Court or a Judge may from time to time remit the matters referred or any of them, or any award thereon, to the re-consideration of the arbitrators or umpire."

†Section 14 of the Arbitration Act, R.S.B.C. 1911, ch. 11, is as follows:—

14 (1) Where an arbitrator or umpire has misconducted himself the Court may remove him.

(2) Where an arbitrator or umpire has misconducted himself, or an arbitration and award has been improperly procured, the Court may set the award aside.

‡Section 396 of R.S.B.C. 1911, ch. 170, is as follows:—

396. The arbitrators to be appointed as aforesaid shall be sworn before a justice of the peace to well and truly decide the questions between the person claiming compensation as aforesaid and the municipality. The said arbitrators shall be and they are hereby required to attend at some convenient place in the municipality, after eight days' notice for that pur-

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Gallihier, J.A.

awarded for lands injuriously affected but not taken as well as upon lands actually taken, and at 7% instead of 5%; and (b) in allowing $2,500 for the costs of moving a house upon the premises, which upon the street being run through, has its back on the line of the street, and which to make it useful and valuable would have to be set back some distance facing the new street.

Section 396 provides that the award may be set aside if the arbitrators have been guilty of misconduct, or have proceeded upon a wrong principle.

Upon the first point, when the matter came before Gregory, J., Mr. Fell of counsel for Mrs. Humphreys, voluntarily agreed to abandon as to excess interest allowed on the compensation awarded for lands injuriously affected, but not taken, and as to the rate of interest being reduced from 7% to 5% (see reasons for judgment, A.B. 197, and recital in formal judgment, A.B. 194), and upon this understanding the learned Judge refused the application to set aside the award.

It seems to me he could not do this. The award was complete, and he had no authority upon the application to alter or amend it. He was bound by the statute, and what was done was tantamount to an amendment of the award: see *Skipworth* v. *Skipworth*, 9 Beav. 135. I think the learned Judge was wrong and on this ground alone I would allow the appeal and set aside the award.

In this view it becomes unnecessary for me to decide the second point, although I can conceive that where a building in its present situation is practically valueless—on the principle that the damage should be minimized—an item for moving which would have that effect might very well be entertained by the arbitrators.

Order setting aside award.

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pose, by or on behalf of the municipality, or by the claimant for compensation, then and there to arbitrate and award, adjudge and determine such matters and things as shall be submitted to their consideration. An award made and agreed to in writing by any two of the arbitrators shall be final: Provided always that any award under this Act shall be subject to be set aside on application to the Supreme Court on the following grounds, and no others, namely, that the arbitrators have been guilty of misconduct, or have awarded the compensation on a wrong principle, in which case reference shall be made again to arbitration as hereinbefore provided.

BELL TELEPHONE CO. v. CANADIAN PACIFIC R. CO. and GRAND TRUNK R. CO.

CAN.

Ry. Com. 1912

May 24.

File No. 19486.

Board of Railway Commissioners. May 24, 1912.

1. TELEPHONES (§ I—5)—INSTALLATION IN SUBWAY—GRADE SEPARATION AT RAILWAY CROSSING.

Where a grade separation has been ordered and a city street is lowered in the public interest, so as to go under the railway line by subway, a telephone company having overhead wires on the street is not entitled to compensation from the railway for the expense of moving and re-locating the telephone line.

Statement

APPLICATION of the Bell Telephone Company of Canada respecting crossing over the Canadian Pacific Railway and Grand Trunk Railway at Brock avenue, Toronto, Ont.

The judgment of the Board was delivered by the Assistant Chief Commissioner at the close of the hearing.

Asst. Chief Commissioner.

ASSISTANT CHIEF COMMISSIONER:—We are unanimously of the opinion that while the Bell Telephone Company has the right to be on the highway, still it must bear the burden of the changing of the highway when we order it for the public good. The grade separation has been ordered there, and the burden of it has, we think, been properly apportioned between the railways and the city, and it occurs now that some burden is placed on the Bell Telephone Company. Well, they will have to bear it for the public good. That is the only way to look at it. The city and the railways bear it for the public good. Therefore, this application is refused.

Application refused.

THE BARNARD-ARGUE-ROTH STEARNS OIL AND GAS COMPANY (Limited), THE ALEXANDRA OIL AND DEVELOPMENT COMPANY (Limited), AND THE CANADA COMPANY v. FARQUHARSON.

IMP.

P. C. 1912

July 31.

Judicial Committee of the Privy Council, Viscount Haldane, L.C., Lord Macnaghten, Lord Atkinson, and Sir Charles Fitzpatrick. July 31, 1912.

1. DEEDS (§ II D 2—41)—CONSTRUCTION—RESERVATION OF MINERALS — SPECIFICALLY MENTIONED—NATURAL GAS.

Natural gas is not within the exception of a deed reserving to the grantor all mines and quarries of metals and minerals, as well as all springs of oil discovered, or undiscovered, on the land conveyed, together with the right to search for, work, win, and carry the same away, where such deed was executed at a time when natural gas was regarded as a dangerous nuisance and long before it became a commercial product, since it was the clear intent of the parties to reserve only the products expressly mentioned in the deed.

[*Farquharson v. Barnard, etc., Co.*, 25 O.L.R. 93, affirmed on appeal.]

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BARNARD-ARGUE-ROTH STEARNS OIL AND GAS CO. v. FARQUHARSON.

Statement

2. MINES (§ II B—41)—DEFINITION OF "MINES" AND "MINERALS."

The words "mines" and "minerals" are not definite terms but are susceptible of limitation or expansion according to the intention with which they are used.

[*Glasgow (Provost of)* v. *Farie*, 13 App. Cas. 657, applied.]

THIS was an appeal from a judgment of the Court of Appeal for Ontario (Mr. Justice Meredith dissenting), of November 29, 1911, *Farquharson* v. *Barnard-Argue-Roth Stearns Oil and Gas Co.*, 25 O.L.R. 93, 3 O.W.N. 239, 20 O.W.R. 351, affirming a decision of Chancellor Boyd.

Sir Robert Finlay, K.C., *Hellmuth, K.C.* (of the Canadian Bar), and *Mr. Rowlatt*, for the appellants.

Danckwerts, K.C., and *C. S. MacInnes*, K.C. (of the Canadian Bar), for the respondent.

LONDON, ENGLAND, July 31, 1912.

The judgment of the Board was delivered by Lord Atkinson.

Lord Atkinson.

LORD ATKINSON said the Canada Company in 1867 granted to Mr. Farquharson the fee-simple of 100 acres at Tilbury, in the Province of Ontario. The deed contained an excepting clause in the following terms:—

> Excepting and reserving to the company, their successors and assigns, all mines and quarries of metals and minerals, and all springs of oil in or under the said land, whether already discovered or not, with liberty of ingress, egress, and regress to and for the said company, their successors, lessees, licensees, and assigns, in order to search for, work, win, and carry away the same, and for those purposes to make and use all needful roads and other works, doing no other unnecessary damage, and making reasonable compensation for all damage actually occasioned.

The sole question for decision was what was the true construction of this clause? Did it or did it not except from the grant the natural gas which impregnated certain underlying strata of these lands. The case did not require that their Lordships should lay down a definition of minerals, nor even draw the line between what were and what were not minerals; the only question for decision was what, having regard to the time at which that instrument was executed, and the circumstances then existing, the parties intended to express by the language they had used, or, in other words, what was their intention touching the substances to be excepted as revealed by that language.

In one sense, continued his Lordship, natural gas is, as rock oil also is, a mineral, in that it is neither an animal nor a vegetable product, and all substances to be found on, in, or under the earth must be included in one or other of the three categories of animal, vegetable, or mineral substance. It is obvious, however, for several reasons, that in this clause of the grant the word

"minerals" is not used in this wide and general sense. First, because two substances are expressly mentioned in the clause which would be certainly covered by the word "minerals" used in its widest sense—namely, "metals," and "springs of oil in or under the lands." Secondly, because the words "all mines and quarries of metals and minerals," coupled with the words "search for, work, win, and carry away the same," do not seem to be applicable to a thing of the nature of this gas, obtainable in the way it is obtained; and thirdly, because of the nature of the relation which exists between this gas and "rock oil, or the springs of oil in or under the ground," excepted in the grant of the function which the gas performs in winning, working, or obtaining the oil from these springs; and fourthly, because of the state of knowledge at the date of this deed and the way in which gas of this kind was then regarded and treated.

As Lord Watson said in the *Lord Provost and Magistrates of Glasgow* v. *Farie*, 13 A.C. 657, 675, the words "'mines' and 'minerals' are not definite terms, they are susceptible of limitation or expansion according to the intention with which they are used." It is clearly established by the evidence that this gas is not volatilized rock oil, nor rock oil condensed natural gas.

The gas is not an exhalation of the oil, nor is it held in solution by the oil to any considerable extent. The gas and the oil are in their chemical composition no doubt both hydro-carbons, but they are distinct and different products, and it, therefore, could not be contended successfully, their Lordships think, that the words "springs of oil" cover this natural gas, simply because both are found in some cases to impregnate the same subterranean porous stratum, and that when this stratum is tapped by a pipe or boring leading to the surface the gas in its escape to the upper air helps to bring up to the surface with it some of the oil.

In some instances a stratum almost entirely impregnated with gas is found separated by a stratum impervious to both gas and oil from a stratum almost entirely impregnated with oil. Both the impregnated strata are then tapped by separate pipes so arranged that the gas performs the same function as in the other case, bringing, or helping to bring, the oil to the surface; but in both cases, when the pressure under which the gas is pent up in the earth is relieved, a pump has to be used to pump up the oil. Again, it was proved at the hearing before the Chancellor that oil mining leases only began to be made by the Canadian company in 1863.

At the date of this deed, January 22, 1867, the winning of mineral oil through gas wells was a comparatively new industry. This natural gas, according to a witness, did not become com-

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Lord Atkinson.

mercially valuable till 1880. And, according to the evidence of others, the accuracy of which did not appear to have been questioned, though gas might be found without the presence of oil, some gas was always found where oil was found, but the gas was regarded as a dangerous and destructive element to be got rid of as it best could. It did not begin to be utilized till 1890, over 20 years after the date of the deed. The inference to be drawn appeared to their Lordships to be that the idea of preserving the ownership of this product, whose presence was regarded in 1867, and for many years after, as a dangerous nuisance, never occurred to the parties to the deed. If, in the attempt to exclude from the grant and preserve to the granting company what was then esteemed a valuable subject of property believed to be in the soil parted with—namely, oil, a term was used which in its wide sense would cover this then worthless product, gas, the parties never intended, their Lordships thought, to use that term in this wide sense.

The company are clearly entitled to search and work for oil in these springs of oil, and to win and carry it away from them, provided they do so in a reasonable manner, and do as little injury as is practicable. While the point does not arise in this appeal for decision, their Lordships think that the company would not be responsible for any inconvenience or loss which might be caused to the respondent or to the owners of the estate of the grantee in the conduct of their operations in the manner mentioned. But, however that may be, their Lordships are, on the whole, of opinion that on the only question raised for their decision, the construction of the excepting clause in the company's deed of January 22, 1867, the decision appealed from was right and should be affirmed, and this appeal should be dismissed, and they will humbly advise His Majesty accordingly. The appellants must pay the costs of the appeal.

Appeal dismissed.

McGREGOR v. HEMSTREET et al.

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Saskatchewan Supreme Court. Trial before Brown, J. March 20, 1912.

1. Mortgage (§ VI B—75)—Sale on default of instalment—Alleged release.

A sale of land under a mortgage for non-payment of monthly instalments of principal was ordered in a foreclosure action in Saskatchewan in terms of an acceleration clause in the mortgage although the defendant offers to pay the sum which is in arrear without reference to the acceleration clause.

2. Mortgage (§ VI F—95)—Foreclosure—Payment of amount in arrears—Sask. statutes, 1910-11, ch. 12, sec. 7.

Sec. 7 of ch. 12, Sask. Statutes 1910-1911 adding sub-sec. (10) of sec. 93 of the Land Titles Act, R.S.S. 1909, ch. 41, providing that if default has occurred in making any payments due under any mortgage, or in the observance of any covenant contained therein and under the terms of the mortgage by reason of such default, the whole principal and interest secured thereby shall have become due and payable, the mortgagor may, notwithstanding any provisions to the contrary, and at any time prior to sale or foreclosure under a mortgage, perform such covenant or pay such arrears as may be in default under the mortgage, together with costs to be taxed by the registrar of land titles, and that he shall thereupon be relieved from the consequence of such default, applies only to proceedings taken before the registrar of land titles and not to a foreclosure action, as the provision as to taxation by the land titles registrar could not have been intended to apply to the taxation of the costs of court proceedings.

3. Costs (§ I—7)—Foreclosure of mortgage—Defendants against whom no claim is made.

Where no claim was made against some of the defendants in an action to foreclose a mortgage, they are not entitled to costs against the plaintiff.

4. Mortgage (§ VI C—83)—Parties—No claim against—Sale instead of foreclosure.

Where some of the defendants, against whom no claim was made in a proceeding to foreclose a mortgage, asked that a sale of the encumbered premises be made, and offered a satisfactory guarantee for the costs thereof, a sale, instead of a foreclosure, will be ordered.

Statement

This is an action arising out of the sale of certain property in Indian Head, by the plaintiff, McGregor, to the defendant, Hemstreet. McGregor represented the property to Hemstreet as clear of encumbrances at the time of the sale, and Hemstreet was to give McGregor a mortgage for $25,000 which was to be a first mortgage on the property, payable $2,000 immediately after sale was put through, and the balance of the mortgage at $250 a month. It was then found that there was a prior mortgage in favour of the Canada Permanent Mortgage Corporation. When this was discovered it was agreed that the amount due thereunder was to be deducted from the $25,000 mortgage and the payment of $2,000 was waived and Hemstreet further contended that the agreement went so far as to release him from any monthly payments, (which had been reduced to $125 instead of $250) until the Canada Permanent mortgage had been paid off.

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The plaintiff commenced foreclosure proceedings and the defendant set up his construction of the agreement above referred to as a defence.

The defendant also further set up in his defence the right to pay the arrears and have the mortgage reinstated under sec. 7, ch. 12, (1910-1911) (an amendment to the Land Titles Act.)

J. A. Allan, for plaintiff.

H. G. W. Wilson, for defendants.

BROWN, J.

BROWN, J.:—The only question at issue in this case is the arrangement arrived at by the parties when the defendant, Hemstreet, assumed the mortgage of the Canada Permanent Mortgage Corporation on March 19th, 1907. The endorsement which was made at that time on the mortgage in question in this action does not, in my opinion, leave the matter open to any doubt. I find the arrangement to be that the defendant, Hemstreet, was to be credited on that date with $5,647.10, being the amount then due under the Canada Permanent mortgage, and that the $2,000 payment to be made on June 1st, 1907, was to be abandoned, and the mortgage money, namely $25,000, was after crediting the $5,647.10 as aforesaid, to be paid in monthly instalments of $250 each beginning with the 1st April, 1907. A payment of $4,030.91 was to be made on February 10th, 1910, for which credit has been given in the plaintiff's claim, and at that time it was agreed that the monthly payments for the next twenty months should be reduced to $125 per month, instead of $250, as provided for in the mortgage. The plaintiff on October 31st, 1911, since the commencement of this action, paid the Canada Permanent Mortgage Corporation on their prior mortgage the sum of $930.20, and this amount should be added as of that date to the amount of the plaintiff's claim. The defendant, Hemstreet, relying on sec. 7, ch. 12, 1910-1911 Statutes of Saskatchewan* asks to be relieved from the consequences of his default upon payment of the amount actually in arrears. I am of opinion, however, that that section can only have reference to proceedings taken before the Registrar of Land Titles, in view of the fact that the section names the Registrar of Land Titles as the party who shall tax the costs. It could never have been intended that he should tax

*The Statutes of Saskatchewan, 1910-1911, ch. 12, sec. 7, adding clause 10 to sec. 93 R.S.S. (1909), ch. 41, provide as follows:—

"(10) In case default has occurred in making any payments due under any mortgage or in the observance of any covenant contained therein and under the terms of the mortgage by reason of such default the whole principal and interest secured thereby shall have become due and payable, the mortgagor may, notwithstanding any provisions to the contrary, and at any time prior to sale or foreclosure under a mortgage, perform such covenant or pay such arrears as may be in default under the mortgage together with costs to be taxed by the registrar, and he shall thereupon be relieved from the consequence of such default."

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the costs of an action taken in the Courts. The defendants, who were represented by Mr. Wilson, other than the defendant, Hemstreet, asked for their costs of defence against the plaintiff. As no claim was made against these defendants, they were not entitled to such costs; but as they have asked for sale and guaranteed, through their counsel, the costs of such sale, I will order a sale of the premises instead of foreclosure. The order of the Court will therefore be that the matter be referred to the local Registrar to ascertain the amount due under the plaintiff's mortgage; and in the event of such amount, together with the plaintiff's taxed costs, not being paid within three months from the date of the Registrar's certificate, that the property in question be sold upon terms and conditions to be settled by the local registrar; such sale to be subject to the amount owing to the Canada Permanent Mortgage Corporation under their two mortgages which are registered against the said property; the proceeds of sale over and above the amount of the plaintiff's claim and costs to be paid into Court. And I direct that a copy of this Order be personally served on Lawson & Jones, Ltd., Bromo Fizz Co., Ltd.; H. H. Mead; George F. Bryan Mfg. Co., Ltd.; and Stirton & Dyer; all execution creditors of the defendant, Hemstreet, but who are not made parties to this action.

Order for sale.

KELLY v. GRAND TRUNK PACIFIC R. CO.
(File 18787.)

CAN.

Ry. Com.
1912

June 10.

Board of Railway Commissioners. June 10, 1912.

1. Carriers (§ IV D—551)—Governmental regulation—Railway commission—Location of depot.

The Board of Railway Commissioners, on fixing the location for a railway station on the Transcontinental Railway at one of two conflicting sites proposed by representatives of settlements closely situated to each other and bearing similar names, will not restrain the location of a second station at the other site on the application of the railway on a case for additional facilities being made out.

Statement

Application of Robert Kelly, for an order approving of the location of station to be constructed by the Grand Trunk Pacific Railway, on lot 882, group 1, Cassiar District, B.C., and restraining the location of any station on lot 851, group 1, Cassiar District; and application of the Grand Trunk Pacific Railway for approval of location of station grounds and station on lot 851, group 1, Cassiar District, B.C.

Mr. McLean.

Mr. Commissioner McLean:—By the Board's order No. 15727 of December 19th, 1911, the railway company was ordered to provide and construct a station on lot 822, group 1, in the Cassiar District of British Columbia. The application of the railway for the approval of the location of station grounds and station on lot 851, group 1, Cassiar District of the Province of British Columbia, was in terms of the said order, refused, and

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the railway company was restrained by said order from locating a station at that point.

Subsequently, on the petition of the Grand Trunk Pacific Railway Company, the matter was taken before the Governor-in-Council, and as a result of the hearing the Governor-in-Council issued an order in the matter rescinding the order of the Board above referred to, and stating,—

> it was made to appear that several different interests directly affected by the location of the stations in question had not had as full opportunity to set forth their respective views as would seem just and desirable and that therefore in their judgment the aforesaid applications of Robert Kelly and of the Grand Trunk Pacific Railway Company should be remitted to the Board of Railway Commissioners for Canada for reconsideration and that all parties interested in the matter of the said applications should have leave to make such further application to the Board of Railway Commissioners for Canada as they might be advised.

Following this the order of the Governor-in-Council remitted the matter to the Board stating that it was,—

> for reconsideration and that all parties interested in the matter of the said applications have leave to make such further application to the Board of Railway Commissioners for Canada as they may be advised.

The matter was heard at length by the Board from June 4th until June 6th. A large amount of material was submitted; the exact value of much of this from the standpoint of evidence is more than questionable. It was not, however, to be expected that, in a section which has not as yet experienced the advantages of railway development, the views expressed as to the effects of the railway development in connection with the question of station sites, could be other than speculative.

As to the provision of the original order requiring the location of a station on lot 882, after careful consideration I am unable to see that this should be varied. The views expressed by the late Chief Commissioner in his judgment are as pertinent to the location of this station now as when uttered. It is a situation which the railway has created for itself, and for the Board to assent to the modification of this term of the order would make it an assenting party to a vital injustice.

In the original hearing the views of the residents of the present town of Hazelton were not to any extent before us; nor was there developed in the record the way in which their interests from the standpoint of traffic convenience were affected by the Board's restraining the railway company from building on lot 851. It may be said parenthetically that it appeared in the re-hearing that the proposed station was actually to be placed on lot 9 instead of on lot 851. This confusion may have arisen from the fact that the station grounds extend on to lot

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851. However, this is mentioned not because it has any material bearing upon the original order, but because the statement is necessary to correctness.

A considerable amount of evidence and opinion was presented in the re-hearing in regard to the highway methods of approach to the proposed station on lot 882, and the proposed station on lot 9 spoken of as South Hazelton. Statements were submitted as to the cost of bridging the Bulkley river. There were also expressions of opinion as to the intention of the Provincial Government in this respect. These expressions were not, however, sufficiently definite to permit one to form any conclusion as to where the bridges, if built, would ultimately be built by the Provincial Government or where the highways would be located.

It appears from the evidence of the representatives of the present town of Hazelton that some point nearer to them than the location on lot 882 would be of greater convenience to them from a traffic standpoint. It also appears that at the present town of Hazelton there is now the convenience of water transportation, and that it is desired that in the new location a similar convenience should exist.

Giving due weight to the mass of material presented at the hearing, much of it contradictory, much of it conjectural, I am of opinion that the representatives of the present town of Hazelton have made out a case for a station location nearer to them than would be afforded by the location on lot 882.

The second paragraph of the operative portion of order 15727 which restrained the railway company as to location of station grounds and station should, therefore, be rescinded, and it should be open to the railway to make application for approval of a station site which will give adequate facilities to the people of Hazelton. The original plan for the location of the station at South Hazelton which is before us, shews that the railway, in the layout of the station grounds and sidings, departed from practically everything which it has considered as a standard from the standpoint of engineering and operating practice. Had the Board required the railway to locate a station under the engineering and operating conditions, which it itself chose in this case, there undoubtedly would have been the most strenuous objection upon the part of the railway. When called upon by the railway to approve of such station site as it may deem convenient for the people of Hazelton, the Board cannot, and will not be oblivious of the standard which the railway has chosen for itself.

THE ASSISTANT CHIEF COMMISSIONER (MR. D'ARCY SCOTT) and COMMISSIONER MILLS concurred.

Order accordingly.

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BATSFORD v. LAURENTIAN PAPER CO.

Quebec Court of Review, Charbonneau and Dunlop, JJ.
January 19, 1912.

1. HIGHWAYS (§ IV B 3—176)—DEFECTS IN SIDEWALKS—LIABILITY OF ABUTTING OWNER—JOINT ACTION—R.S.Q. 1909, ART. 5641, SUB-SEC. 20.

If sub-sec. 20 of art. 5641 of the Cities and Towns Act, R.S.Q. 1909, providing that every owner of land situated on any street, public way, etc., established in a municipality (which owner of land is obliged by the municipal council under the authority of sub-sec. 3 of said art. 5641 to make and maintain a sidewalk in front of his property) shall be responsible towards the municipality for the damages resulting from his neglect and may be called in warranty by the municipality in all cases brought against it for damages, renders such owner not only liable in warranty to the municipality but also to the public, he can be so only jointly and severally with the corporation, and therefore no action for injury to a person resulting from a defective sidewalk can be maintained against the abutting owner alone.

2. HIGHWAYS (§ IV D 2—235)—FAILURE TO GIVE NOTICE OF INJURIES AND TO BRING ACTION WITHIN STATUTORY TIME—DEFECT IN SIDEWALKS—R.S.Q. 1909, ART. 5641, SUB-SEC. 20.

The failure to give notice to the clerk of a municipality within sixty days of an injury sustained on a defective sidewalk without an explanation sufficient to justify the Court to permit the maintenance of the action after the expiration of such period, or the failure to begin action for injury against the municipality within six months of the date of the accident as required by art. 5864 of the Cities and Towns Act, R.S.Q. 1909, will bar an action not only against the municipality but also against the property owner who is answerable to the municipality under secs. 20 of art. 5641 of said Cities and Towns Act for failure to maintain such sidewalk in a safe condition as required by a municipal by-law, whether the liability created by such sub-sec. 20 rendered the property holder liable to the public as well as to the municipality or only gave a right to the municipality to call him in as warrantor.

3. LIMITATION OF ACTIONS (§ III F—130)—DEFECTIVE SIDEWALKS—ABJOINING OWNER'S STATUTORY DUTY—TIME FOR BRINGING ACTION AGAINST MUNICIPALITY.

If the land proprietor is under any direct liability to the injured party for neglect to keep adjacent sidewalks on the public street in repair, or free from snow or ice, by virtue of a municipal by-law (R.S.Q. 1909, art. 5641, sub-secs. 3 and 20), the neglect of such duty would, at most, be only a *quasi-delit* of omission on the part of the municipality, and the land proprietor jointly and severally, and the latter may set up the same defences as would be available to the municipal corporation, including the prescriptive limitation by which action against the municipality must be taken within a period of six months after the accident (R.S.Q. 1909, art. 5684, C.C. Que., arts. 1106, 1112, and 2231).

Statement HEARING in review of a case referred to the Court of Review by the trial Judge.

The appeal was allowed and the action was dismissed.

F. S. Maclennan, K.C., for the plaintiff.
Brown, Montgomery & McMichael, for the defendant.

The judgment of the Court of Review was delivered by

Charbonneau, J. CHARBONNEAU, J.:—In this case, which is an action of damages resulting from a fall on a sidewalk of the town of Grand-

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Charbonneau, J.

Mère, the jury returned a verdict for $500, but the case was reserved by the trial Judge on the question of liability, which is mainly a question of law, the facts of the case being uncontroverted.

The town of Grand'Mère comes under the general provisions of the Cities and Towns Act. By article 5641, sub-secs. 3 and 20, it is authorised to make by-laws for the laying of sidewalks and their maintenance during summer and winter.

Sub-section 20 provides that every person obliged to maintain sidewalks shall be liable to the municipality, and may be summoned in warranty in all cases brought against it for damages.

The town of Grand'Mère did actually pass a by-law for the construction and maintenance of sidewalks, making it the duty of the riparian proprietors to keep them in a safe condition. The defendant in this case is such a riparian proprietor.

The first question is whether this by-law makes the defendant liable to the public, as well as towards the municipality.

If this question is answered in the affirmative, a second question arises whether such liability is distinct from that of the corporation, or is subject to the same rules. The first question is a very controverted one, notwithstanding the clause of the statute which mentions only a liability to the municipality, and only in warranty; but I think that it is not necessary to decide it, in the present case, for the following reason. If the riparian proprietor is not only liable in warranty to the corporation, but also to the public, he can only be so jointly and severally with the corporation.

The corporation, by laying part of its duties on the riparian proprietors, does not, and cannot thereby subject them to a heavier responsibility than it originally bore, nor even to a different one. The effect of the by-law was simply to make another party share in the fulfilment of a duty, and the neglect of such duty would only be a joint and several *quasi-délit* of omission (article 1106 C.C.), and such *quasi-délit* should be governed by the same rules, as to both delinquents; the proprietor can therefore plead the same exceptions as his co-debtor of the same duty, the corporation (article 1112 C.C.). The same rules of prescription must apply to an action against either party (article 2231 C.C.).

By article 5864 of the Revised Statutes, the plaintiff was bound, within sixty days from the date of the accident, to give a notice of the accident to the clerk of the corporation, failing which she could not claim damages, and her action must be instituted within six months from the date of the accident. In this case no notice was given, and no reason offered to explain such failure, which would justify the Court to exercise its discretion, and the action was taken after the limitation of six months had expired.

If the principle above mentioned is correct, the liability of the corporation, although extended to the riparian proprietor,

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was not increased, and the action against the proprietor should be dismissed, as it would have been dismissed if brought against the corporation, on the two grounds above mentioned, the want of notice and the limitation of time.

On the other hand, if there is only a right for the corporation to call in the riparian proprietor as warrantor, it is quite evident that the plaintiff could not pass over the corporation, the party primarily liable, to reach the proprietor and exercise against him rights which were absolutely lost against the principal debtor of the duty.

For these reasons, we are of opinion to dismiss the action of the plaintiff, notwithstanding the verdict.

Appeal allowed and action dismissed.

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QUEER v. GREIG.

Yale County Court, B.C., Judge Swanson, County Judge. April 9, 1912.

1. EVIDENCE (§ II B—108)—BURDEN OF PROOF OF NEGLIGENCE.

The onus rests upon the plaintiff of establishing the negligence of the defendant in an action for injuries sustained as the result thereof, and if, in the absence of direct proof, the circumstances are equally consistent with both the plaintiff's and the defendant's case, the plaintiff fails.

[*Wakelin* v. *London and South Western R. Co.* (1886), 56 L.J.Q.B. 229, 12 App. Cas. 41, 55 L.T.N.S. 709, specially referred to.]

2. EVIDENCE (§ II H 1 F—270)—STATUTORY PROVISION AS TO BURDEN OF PROVING SPEED OF AUTOMOBILE.

Section 42 of the Motor Vehicles Act, R.S.B.C. 1911, ch. 169, by which in any prosecution for any offence against its provisions occurring while the motor vehicle was in motion on any highway the person in charge or control of the motor vehicle, on being prosecuted therefor, shall be deemed to have been driving at an unlawful speed until the contrary is proven and is further required to prove the actual rate of speed at which the motor vehicle was being driven, does not apply to cast the same onus of proof on the defendant in a purely civil action for damages although the same default or neglect is relied upon as might be the subject of a prosecution for penalties under that statute.

3. AUTOMOBILE (§ II—11)—LIABILITY OF OWNER FOR INJURIES TO HORSE FRIGHTENED BY STEAM SHOVEL—B.C. MOTOR VEHICLES ACT, R.S. B.C. 1911, CH. 169, SEC. 29.

One who was carefully driving an automobile at slow speed on a highway is not liable, under sec. 29 of the Motor Vehicles Act, B.C. 1911, for injuries sustained by a horse, where it appeared that it became frightened and unmanageable, not at the automobile, but by a steam shovel that was in operation near the road, and ran into the automobile.

4. EVIDENCE (§ XII A—924)—WEIGHT OF EVIDENCE—FALSE IN IMMATERIAL PARTICULARS.

The evidence of a witness will not necessarily be disregarded *in toto* because false in an immaterial particular.

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ACTION for the loss of a horse by injury on the highway through the alleged negligence of defendant while driving an automobile.

J. A. Maughan, for the plaintiff.

M. L. Grimmett, for the defendant.

SWANSON, County Court Judge:—I am satisfied that the plaintiff has failed to prove negligence on the part of the defendant. The onus of proof of negligence is cast upon the plaintiff: *Wakelin* v. *London and South Western R. Co.* (1886), 12 App. Cas. 41, 56 L.J.Q.B. 229 (House of Lords). The Lord Chancellor, Lord Halsbury, at p. 230 [56 L.J.Q.B.] says:—

> It is incumbent on the plaintiff in this case to establish by proof that her husband's death has been caused by some negligence of the defendant's, some negligent act, or some negligent omission, to which the injury complained of in this case, the death of the husband, is attributable. That is the fact to be proved. If that fact is not proved, the plaintiff fails; and if, in the absence of direct proof, the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails, for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition—*ei qui affirmat non ei qui negat incumbit probatio.* [12 App. Cas. at pp. 44-45.]

The burden of proof provided for under the very unusual section (42) of our Motor Vehicles Act, R.S.B.C., ch. 169, under which, in any prosecution under that Act, the defendant is presumed to be guilty of the offence charged against him until he proves himself innocent, has, fortunately, nothing to do with a civil action for damages such as the case at bar.

Section 29 provides that the person in charge of a motor vehicle shall use reasonable precaution not to frighten horses on the highway. I do not find any negligence on the part of the defendant, who is shewn by the evidence to be an experienced driver. The character of that portion of the roadway along which the accident happened, strewn as it admittedly was, and very thickly, with large rocks, which are frequently rolling down from the gravely hillside abutting the roadway, is a circumstance in the defendant's favour, presupposing on the part of a reasonable man, in his own interest, if nothing more, the exercise of due care in the handling of his car on such a difficult piece of road. The plaintiff's son, an Indian boy, who had been riding the horse, had to pass close by a steam shovel working very close to the roadside before he met the defendant's car. The roadway in question is a very narrow one, shut in on the south side by a high board fence and on the north side by a spur track of the Canadian Pacific Railway, which is used for getting gravel out of this gravel bank or pit. The boy's horse was a young and fractious one, and was frightened first by the steam shovel, past which it had to be forced twice by the boy in going to and returning from Coutlee. The Indian boy states

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that, after passing the steam shovel the second time, on his return from Coutlee, he got his horse under control, and about 150 feet further on met the defendant in his motor car. He says the car was going "very fast"; that it never slowed up until after the accident. He says the motor frightened his horse, which began to rear and couldn't be controlled by him. The boy says he then jumped off, but held on to the reins; that the horse then reared and backed away from the car; that he couldn't hold him any longer, and had to let go the lines. He says that the horse then ran before or, rather, to the right side of the car, and was struck by the car. The boy says the car never stopped until after the accident, when, he says, the defendant came back to where he was with his horse. When the car struck his horse, he says, the horse's left front foot got into the right front car wheel, and was broken; the horse, however, was not knocked down.

The defendant, on the other hand, states that he used every precaution, blowing his horn before he rounded the point at the entrance to this rock-strewn piece of roadway; that he saw the horse approaching near the steam shovel, and that it was then greatly excited. On observing this, he says, he changed his gear from high to intermediate, travelling on it at slow speed for about four lengths of his car, then went into low gear, afterwards slipping his clutch and creeping along at only one or two miles an hour, and that, when he came to within forty feet of the horse, he stopped his car entirely, and shut off his electric switch, thus closing down the noise of his engine. The defendant says that the horse was very much excited; that the boy got off his horse; that the horse then started to prance and rear, and was being led along by the boy. When within a few feet from the front end of his car, he says, the horse broke away from the boy, backed into the track of the gravel pit spur at the side of the road, and then made a plunge, and landed with his front feet on the tonneau of the car, striking the defendant on the right elbow with one foot; the horse came down on and bent downwards one of the brass tire irons on the right side of the car, bending it almost double, and one front foot slipped down on to the front right hand mud-guard of the car, and bent it downwards towards the wheel. The defendant says that the horse took a swerve, and at the same time one of its front feet slipped into the spokes of the right front car wheel, and evidently broke the shank of the animal's leg about ten inches above the hoof, as he afterwards discovered. This all happened, as he says, almost instantaneously.

After the injury to the horse, it stood still, apparently with no life or go in it. The horse was never thrown down. The horse had to be subsequently shot. The value of the horse, in my opinion, is $100.

These injuries to the car were seen a few minutes afterwards by James Netherton, the railway man in charge of the steam shovel at the time of the accident. I am satisfied that these injuries to the car were caused in the manner described by the defendant. It seems incredible to me that the car should have received such, if it were going at such high speed as the Indian boy says, and ran against the horse. The plaintiff's story that the horse got injured by getting its foot into the front wheel of the rapidly passing car, and not being knocked down, seems to me quite unreasonable.

The defendant's evidence is corroborated by a woman who is styled Marion Greig, who accompanied the defendant in the car. She swore that she is the wife of the defendant. The plaintiff's counsel endeavoured, in his cross-examination, entirely to discredit the testimony of this woman, on the ground that she had committed perjury when she swore she was the defendant's wife. I am satisfied from the way she gave her evidence that, when she made that statement which was impeached, she was swearing to something which is not true. At the same time, I do not feel disposed to discredit her whole testimony and that of the defendant Greig on that account. A Judge must endeavour to separate the wheat from the chaff. The defendant's story bears the ear-marks of what is probable and reasonable, under all the circumstances.

There will be judgment dismissing the action.

Action dismissed

Re K.

Ontario High Court, Middleton, J. March 20, 1912.

1. WILLS (§ III G 7—150)—CONSTRUCTION OF DEVISE OF INCOME FROM FUND FOR LIFE—INTEREST FROM DEATH OF TESTATOR.

Where a testator directs his executor to set aside or invest a certain sum out of his estate, and out of the income therefrom to make an appropriation for the maintenance of a certain person in continuation of a similar appropriation to him made by the testator while alive, the beneficiary is entitled to the income from such sum from the date of the testator's death, and it is competent to the executor to hold for this fund interest-bearing securities which came into his hands, and to pay the income therefrom for the maintenance of the beneficiary.

[*Cook* v. *Hecker*, 36 N.Y. 15, followed; *Re Crane*, [1908] 1 Ch. 379, distinguished.]

2. WILLS (§ III G 4—135)—CONDITIONAL OR ABSOLUTE GIFT—SETTING ASIDE INTEREST-BEARING SECURITIES — MAINTENANCE OF SISTERS — CONTINUATION OF YEARLY PROVISION.

Where a testator directs his executor to set aside or invest a certain sum out of his estate, and out of the income therefrom to make an appropriation for the maintenance of his sisters, in continuation of a yearly provision which he and his brothers jointly had made for

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them during his lifetime, and expresses his desire, in the will, that his brothers shall, after his decease, continue to contribute to the maintenance of his sisters, the provision for the sisters is not thereby made conditional upon the testator's brothers continuing to contribute towards their maintenance.

Statement

MOTION by the executors of the will of J. G. K., upon originating notice, for an order determining certain questions arising upon the will.

J. D. Bissett, for the executors.

W. E. Raney, K.C., for the sisters of the testator.

C. G. Jones, for the Inspector of Prisons and Asylums, statutory committee of the widow and one daughter of the testator.

Middleton, J.

MIDDLETON, J.:—By his will the testator, who died on the 30th July, 1910, among other things, provided as follows:—

"I direct my executors to set aside or invest the sum of $10,000 and out of the income therefrom to make an appropriation yearly toward the maintenance of my sisters Emma Katherine and Marian who are now unmarried during their lifetime or the lifetime of such of them as remain unmarried but not to exceed $600 per year it being understood that this provision for my said sisters is only to be enjoyed by them or such of them as remain unmarried. This provision for my said sisters is made by me as I have been in the habit in my lifetime of making some yearly provision towards their maintenance in company with my two brothers and I express it as my desire that my two brothers shall after my decease continue to contribute also towards the maintenance of my sisters."

Subject to this provision and other provisions not now material, and to an annuity to the widow, which is not affected by the question in issue, the estate goes to the testator's five daughters. The questions raised upon this motion are:—

First, are the testator's sisters entitled to receive interest upon the $10,000 from the death of the testator or only from the expiry of one year from his death?

Secondly, have the executors discretion so to distribute the estate as to allot interest-bearing securities to the fund in question so that interest will be provided from the testator's death?

Thirdly, is the provision for the sisters conditional upon the testator's brothers continuing to contribute towards the sisters' maintenance?

Upon the argument I dealt with the last question, holding that the provision was in no way conditional.

There was not cited to me, nor have I been able to find, any English or Canadian authority expressly in point upon the question of interest. There is no doubt that an annuity will be computed from the death of the testator, and there is equally no

doubt that, subject to some exceptions, interest upon a legacy will be computed from a year from the testator's death. This case is neither an annuity nor a legacy of a capital sum. It is a gift of the income to be derived from a portion of the testa- income during the lifetime of the beneficiaries.

I was told—and the motion was argued upon this footing— tor's estate to be set apart for the purpose of producing such that the testator's estate amounts to about $275,000; a consider- able portion of this being interest-bearing securities. Having this in mind, it appears to me to be plain that the intention of the testator was, that the executors should set aside out of the investments already made, or if they saw fit, invest, $10,000, and use the income towards the maintenance of those sisters in continuation of the testator's benevolence during his lifetime; and he could not have intended that there should be a period during which they would not receive the aid which he in his lifetime had given and which he contemplated continuing after his death.

The well-reasoned case of *Cook* v. *Meeker*, 36 N.Y. 15, sup- ports this position. It is there said: "When a sum is left in trust, with a direction that the interest and income should be applied to the use of a person, such person is entitled to the interest thereof from the date of the testator's death." That case is largely founded upon English authorities, although none of them is precisely in point.

Mr. Jones relied upon the case of *Re Crane*, [1908] 1 Ch. 379; but I think that, when carefully considered, it is dis- tinguishable. There a sum of £8,000 was to be paid by the ex- ecutors to trustees, and these trustees would hold on certain de- fined trusts, inter alia to pay the income to the testator's daugh- ter-in-law during her widowhood. It was held that the legacy did not carry interest from the testator's death. There the legacy was the capital sum directed to be paid to the trustees; and it was attempted to bring the case within the well-known exception to the general rule which has been recognised where the beneficiaries are infants to whom the testator stood in loco parentis, and the Court has held that a gift of the income in the meantime for the maintenance must be implied, otherwise there would not be any fund for maintenance. Swinfen Eady, J., held that this rule had not been and could not be extended to the case of adults.

That case, it appears to me, has no bearing upon the present one, where the gift is not of the corpus but of income. Four of the testator's daughters, who are sui juris, assent to the con- tention of the sisters; and this application is only necessary by reason of the misfortune of the remaining daughter.

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It will, therefore, be declared that the sisters are entitled to the income derived from $10,000 from the date of the death of the testator, and that it is competent for the executors to treat as held for this fund interest-bearing securities which came to their hands and to pay the income therefrom (subject to the limitation found in the clause itself) for the maintenance of the three sisters.

The costs of all parties will be out of the estate; those of the executors as between solicitor and client.

Order accordingly.

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Re JOHNSON.

Ontario High Court, Britton, J. July 2, 1912.

1. WILLS (§ III G 8—157)—DEVISE—CONSTRUCTION — SURVIVORSHIP OF LEGATEES—TENANTS IN COMMON.

A devise of property to the mother and sister of a testator, "or the survivor of them," makes them tenants in common, since the survivorship mentioned was referable to the death of the testator, and not to that of the devisees.

[Theobald on Wills, 4th ed., p. 554, specially referred to; *Peebles* v. *Kyle*, 4 Gr. 334, and *Smith* v. *Coleman*, 22 Gr. 507, distinguished.]

Statement

MOTION by Eliza Blackwood, executrix of the will of Margaret J. Johnson, deceased, the mother of John Roger Johnson, deceased, and one of the devisees named in his will, upon an originating notice under Con. Rule 938, for an order determining a question as to the construction of his will.

The motion was heard at Cornwall.

G. A. Stiles, for the applicant.

R. A. Pringle, K.C., for Catharine Lillian Warner (formerly Catharine Lillian Froom).

Britton, J.

BRITTON, J.:—John Roger Johnson made his will on the 1st September, 1904, in the words following:—

(1) "I will and direct my executrices hereinafter named to pay my just debts and funeral and testamentary expenses out of my personal estate.

(2) "I will and devise all of my real and personal estate to my mother Margaret J. Johnson and to my sister Catharine Lillian Froom or the survivor of them.

(3) "I hereby appoint my mother Margaret J. Johnson and my sister Catharine Lillian Froom executrices of this my will and I hereby revoke all other wills by me heretofore made."

The testator died on the 9th May, 1905. Both his mother, Margaret, and his sister Catharine survived the testator; but the mother, Margaret, died on the 22nd November, 1911.

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The contest here is between the sisters, Eliza Blackwood and Catharine Lillian Warner (formerly Catharine Lillian Froom) as to the true meaning of the second clause of the will. It is contended on behalf of the applicant Eliza Blackwood that the survivorship mentioned has reference to the testator; and, as both the mother and sister survived the testator, they took as tenants in common.

The rule as laid down in Theobald on Wills, 4th ed., p. 554, seems correct as deducible from the authorities: "Survivorship is to be referred to the period of division. If there is no previous interest given in the legacy, then the period of division is the death of the testator—and the survivors at his death will take the whole legacy. But, if a previous life estate is given, then the period of division is the death of the tenant for life, and the survivors at such death will take the whole legacy. The same rule applies to realty as to personalty." See cases cited by Theobald.

Here no life estate was given. It was a direct gift to the two—the mother and sister or the survivor. They both survived the testator—they both took it all, as tenants in common.

Some of the cases cited on the argument and relied upon for Mrs. Warner are outside of this rule. In *Peebles* v. *Kyle*, 4 Gr. 334, there was a devise to the wife of the testator for life, with remainder to A. B., and C., or survivors or survivor of them. Survivorship there meant survivors at the death of the tenant for life—and not of the testator. In *Smith* v. *Coleman*, 22 Gr. 507, there was a devise to the wife for life.

There will be a declaration that the survivorship mentioned in the will of John Roger Johnson was referable to the death of the testator; and, upon the testator's death, Margaret J. Johnson and Catharine Lillian Froom took as tenants in common.

There will be no order as to costs.

Application refused.

DAGENAIS v. THE MODERN REALTY & INVESTMENT Co., Ltd.

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Quebec Superior Court, Demers, J., (Montreal). January 31, 1912.

1. PRINCIPAL AND AGENT (§ II B—17)—IMMOVABLE PROPERTY—PROMISE OF SALE ACCEPTED ON BEHALF OF A PARTY WHOSE NAME IS NOT DISCLOSED.

Where a promise of sale of immovable property is accepted in these words, "This promise is accepted for our client," and the name of the client is not disclosed at the time, there is a valid sale and the person accepting the promise becomes personally responsible as the purchaser unless he discloses his client's name and the latter accepts the property.

Desbois & Delage, for the plaintiff.
Gilman & Boyd, for the defendant.

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DAGENAIS v. THE MODERN REALTY & INVESTMENT CO., LTD.

DEMERS, J.

DEMERS, J.:—The defendant has accepted the promise of sale from the plaintiff. The defendant's written document states that "this promise is accepted for our client."

This is a case of the *reserve d'elire command* (reserve of electing a purchaser).

There is a contract before the purchaser appears. Until the real purchaser appears the party who has stipulated is the acquirer (Beaudry-Lacantinerie, Sale, vol. 1, Nos. 172 and 176). The person who stipulates is bound up till the time he discloses his principal if he has one, and if he has none up till the time some one has accepted (Beaudry-Lacantinerie, vol. 1, No. 180).

The defendant gave the name of Dunn. It had no mandate from Dunn. Dunn always refused to engage himself and therefore it remains under the obligation, because since there is a sale there must be a buyer.

When it was called upon to sign the deed of sale or to pay the price it refused, and the reason given was that it had never bought.

It was sued and pleaded the same ground adding that the deed which was tendered to it did not mention certain movable property which was accessory to this apartment house.

It is to be noticed that by his conclusions the plaintiff asks that the judgment should order the defendant to pass a deed according to the terms of the promise of sale. In order to be entitled to costs the defendant should have declared itself ready to pass such a deed. It is true that it can do without a title deed if it wishes, that is its own affair. It was evidently through an omission on the part of the notary that the accessories were not mentioned. He intended to describe the immovable. The transmission of movable property does not require a title. These movable effects which serve for the carrying on of the apartment house form part of it. But in order to dispel any doubt in regard to the matter, the Court allowed the plaintiff to fyle a deed which expressly included them. The defendant is none the more ready to sign a deed. It is in fact evident that this is not the point in issue.

Under these circumstances I do not think that the costs should be divided.

The defendant loses and it must pay the costs excepting those of the re-hearing.

Judgment for plaintiff.

KIZER v. THE KENT LUMBER CO., Ltd.

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May 10.

Nova Scotia Supreme Court, Meagher, J., Graham, E.J., Russell and Ritchie, JJ. May 10, 1912.

1. MASTER AND SERVANT (§ II C 1—192)—LIABILITY OF MASTER—CONTRIBUTORY NEGLIGENCE—BREACH OF STATUTORY CONDITION—N.S. FACTORIES ACT (1901) CH. 1, SEC. 20.

A servant, whose duty required him to work in a restricted place at a table in close proximity to a set-screw in a revolving shaft that was not guarded, as required by sec. 20 of ch. 1 of the Nova Scotia Factories Act of 1901, is not guilty of contributory negligence, where, while passing over the table in the discharge of his duties, his clothing was caught by such set-screw and he was seriously injured.

[Compare *Sivea* v. *Temiskaming Mining Co.*, 2 D.L.R. 164, 25 O.L.R. 524.]

2. MASTER AND SERVANT (§ II A 4—71)—LIABILITY OF MASTER—UNGUARDED SET-SCREW IN SHAFT—N.S. FACTORIES ACT (1901) CH. 1, SEC. 20.

Failure to guard protruding set-screws in a revolving shaft, as required by sec. 20 of the Nova Scotia Factories Act of 1901, at a place in close proximity to which a servant in the discharge of his duty was compelled to work, and which could have been guarded by placing a board over the shaft, renders the owner of a saw-mill liable for injuries sustained by the servant, whose clothes were caught by such set-screw, while he was in the discharge of his duty.

3. MASTER AND SERVANT (§ II A 4—71)—FAILURE TO GUARD SET-SCREW—BREACH OF STATUTORY DUTY—DEFECT WITHIN R.S.N.S. 1900, CH. 179, SECS. 3 AND 5, SUB-SEC. (*a*).

Failure to guard, as required by the Nova Scotia Factories Act, of 1901, ch. 1, sec. 20, a protruding set-screw in a revolving shaft in a saw-mill at a point in close proximity to which a servant was required to work, constitutes a defect, within the meaning of ch. 179, sec. 3, and sub-sec. (*a*) of sec. 5 of the Employers' Liability Act, R.S.N.S. 1900, in the arrangement of the work and machinery of which the master was aware, so as to render him liable for injuries sustained by the servant through his clothing catching on the set-screw.

4. MASTER AND SERVANT (§ II B 3—144)—LIABILITY OF MASTER—UNGUARDED SET-SCREW—VOLUNTARY ASSUMPTION OF RISK.

A servant who continues in an employment with knowledge of the close proximity of a protruding set-screw in a revolving shaft that was not guarded, as required by ch. 1, sec. 20, of the Nova Scotia Factories Act of 1901, does not thereby voluntarily assume the risk of injury therefrom, so as to deprive himself of a cause of action for personal injuries under the Employers' Liability Act of N.S. 1900.

[Compare *Sivea* v. *Temiskaming Mining Co.*, 2 D.L.R. 164, 25 O.L.R. 524.]

5. MASTER AND SERVANT (§ II A 4—71)—SAW-MILL—MILL-GEARING—GUARDING—N.S. FACTORIES ACT (1901), SEC. 20.

A saw-mill is a "factory" within the meaning of sec. 20 of the Nova Scotia Factories Act (1901), which requires that all dangerous parts of mill-gearing, machinery, etc., shall be, so far as practicable, securely guarded, as such Act declares that "mill-gearing" comprises "every shaft, whether upright, oblique, or horizontal."

6. ACTION (§ II A—44)—CHOICE OF REMEDY—UNDER N.S. FACTORIES ACT (1901) OR UNDER EMPLOYERS' LIABILITY ACT, R.S.N.S. 1900 CH. 179.

It was the intent of the legislature that a violation of the statutory duty imposed by the Nova Scotia Factories Act, which requires that

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all dangerous parts of mill-gearing, machinery, etc., shall be, so far as practicable, securely guarded, should create a liability, independent of the Employers' Liability Act, for the benefit of a servant who sustained injuries as a result of such violation of the Factories Act. (*Per* Ritchie, J.)

[*Wallace* v. *Falle*, 13 Q.B.D. 109; *Groves* v. *Lord Wimborne*, [1898] 2 Q.B. 402, and *Sault Ste. Marie Pulp and Paper Co.* v. *Myers*, 33 Can. S.C.R. 23, specially referred to.]

7. MASTER AND SERVANT (§ II B 3—144)—ASSUMPTION OF RISK—BREACH BY MASTER OF STATUTORY DUTY—"VOLENTI NON FIT INJURIA."

The maxim, *volenti non fit injuria*, is not applicable where a servant sustains injuries as a result of a violation of a statutory duty by a master.

[*Thomas* v. *Quartermaine*, 18 Q.B.D. 685; *Rodgers* v. *Hamilton Cotton Co.*, 23 Ont. R. 425; *Baddeley* v. *Earl of Granville*, 19 Q.B.D. 423; *Kelly* v. *Glebe Sugar Co.*, 20 Rettie, 833; *Thompson* v. *Wright*, 22 Ont. R. 127; *Groves* v. *Lord Wimborne*, [1898] 2 Q.B. 402, and Beven on Negligence, 3rd ed., p. 645, specially referred to; see also *Clark* v. *C.P.R.*, 2 D.L.R. 331.]

Statement

ACTION by plaintiff under the Employers' Liability Act to recover damages for injuries alleged to have been sustained by him, while in the defendant company's employ, by reason of defects in the condition or arrangement of the ways, works, machinery, plant, buildings and premises in defendant's sawmill at Gold River, in the county of Lunenburg, and by reason of the negligence of persons in defendant's employ entrusted with superintendence, etc. The facts are sufficiently set out in the judgments.

The action was tried before Drysdale, J., at Bridgewater, October 25th, 1911, and judgment given two days later in favour of defendant, on the ground that plaintiff by his own negligence and careless act was the direct and sole cause of his injuries.

The appeal was allowed.

Argument

V. Paton, K.C., for plaintiff, appellant:—There is no dispute as to the facts, but the learned trial Judge erred in thinking that plaintiff tried to climb up over the coupling which caught his clothing, the fact being that he was pushing a plank that was on the table out of his way. This saw mill was a factory within the meaning of the Factories Act, and that Act governs the case: Acts of 1901, ch. 1, sec. 2, sub-secs. 1 (a) and 10. It was the duty of defendant to place guards around machinery wherever practicable. The statute imposes an absolute duty and though the neglect is due to error of judgment on the part of an employee, the owner is liable: *David* v. *Britannic Coal Co.*, [1909] 2 K.B. 146; *Groves* v. *Lord Wimborne*, [1898] 2 Q.B. 402; *Smith* v. *Baker*, [1891] A.C. 325; *Tobin* v. *New Glasgow Coal Co.*, 26 N.S.R. 268.

Messrs. *J. A. McLean*, K.C., and *D. C. Sinclair*, for defendant, respondent:—Plaintiff could have avoided the accident by the exercise of ordinary care. The Factories Act does not apply

to this case. *McPherson* v. *Vail*, 40 N.S.R. 517, was decided after that Act was in force. The machinery that caused the accident was not dangerous and did not require to be guarded. It was plaintiff's contributory negligence that caused the accident: *Dominion Iron and Steel Co.* v. *Day*, 34 Can. S.C.R. 387; *Dominion Iron and Steel Co.* v. *Oliver*, 35 Can. S.C.R. 517; *Sullivan* v. *India Manufacturing Co.*, 113 Mass. 396.

Paton, K.C., replied.

Graham, E.J.

GRAHAM, E.J.:—This is an action for negligence at common law and under the Employers' Liability Act. The plaintiff, an employee of the defendant company, was injured in their mill through having the front bib of his overall trousers caught in the coupling of a horizontal revolving open shaft winding him towards it and injuring him in his private parts. The shaft was about 30 inches above the floor along the side of a table upon which lumber was brought down and about a foot from it.

The shaft was between one and a quarter or one and a half inches in diameter, and the coupling consisted of two flanges about six or eight inches in diameter, bolted together with four bolts with heads and nuts protruding above the surface of the flange.

The shaft operated rollers above this and other longitudinal tables, and these rollers brought down the lumber from the saws above to trimming saws beneath the table, which trimmed off the ends. There were under the tables four endless revolving chains operated by the shaft and revolving in the same direction. The lumber which came down the rollers had moved down from the table on to the revolving chains by the men to be transferred to the trimming saws. For this purpose the chains had horns or dogs projecting every four feet to hold the lumber.

There were two chutes, one in front of each trimmer, through which ends trimmed off were carried down.

One of the trimming saws near which the plaintiff was stationed on the near side of the table in question was a stationary circular saw. The other trimmer, also a circular saw, on the farther side of the table, was a jump saw worked with a foot lever at the lower end of the table. If the stick was too short to be trimmed by the stationary trimmer, the jump saw on the other side of the table was moved so that it trimmed the stick as it was transferred on the chains under the table.

It was the duty of the plaintiff, when the lumber came down the table, together with the person attending to the jump saw, to remove it from the rollers on to the chains.

The plaintiff, besides attending to the stationary trimmer and to the removal of the lumber from the rollers on to the chains, was in the course of his duty required to cross over and above the table from the gangway on the near side in order to

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put into the chute in front of the jump saw any ends which were too long to go into it automatically, and he did this by tripping them and he thus prevented the chute from getting blocked up. Any ends which were longer than four feet and thus fit for laths, he had to recover and place them on the table. Before his return across the table he disposed of the lath wood thus recovered to be sent to another saw and made into laths.

In crossing over to the farther side he could step upon the end of a wooden groove which supported the revolving chains about 16 inches above the floor, thence to the table, across the table and descend on the other side, using the wooden groove for a step, again avoiding of course the horns of the revolving chains and the lumber.

He had on the occasion of the accident crossed to the further side, cleared the chute in front of the jump saw, and removed a bit of lath wood to the table and was about to return. Just then there came down this particular table on the rollers a two-inch hemlock plank. Near to the end of this table is a fender placed diagonally across the table.

The object of this is to deflect the end of such a stick to the near side of the table, where it can be conveniently reached by the man at the end to lift it on to the chains. There is a bumper, too, at the very end to stop the stick. The tendency of the fender in deflecting the one end in that direction was apparently to deflect the near end in the other direction. At least that was what happened, and it prevented the plaintiff from getting on to the table in order to return. The spirals to assist the removal of lumber to the near side were apparently not effective.

In order to get these planks out of his way he pushed the end from him further on to the table, and that act unfortunately brought him nearer to the side of the table and to the revolving shaft and enabled this coupling to catch his clothing in the way I have mentioned.

He had to cross this table as often as twice in an hour, but of course the occasions for his doing this varied as to occurrence.

The speed of the revolving chains is about 90 feet in a minute—not very great, but they were loaded with the lumber that is being transferred and this lumber would take the man in the legs if he did not step over it. On the further side of the table he would work in a restricted space between two of the four revolving chains and also near to the revolving coupling. The space, Curll says, was about two feet in width and about four in length. Hughes, defendant's foreman, says:—

> Q. This space that the man stood in was about two feet wide?
> A. I should say so.
> In the evidence it is sometimes spoken of as a hole.
> And the revolving coupling, as I said, was in this space.

James Mosher, an employee of the defendant, the plaintiff's successor, in fact, says:—

Q. In crossing back and forth, did you have to go near the coupling?

A. When putting a piece of lath wood on I would go near the coupling. I was aware that a man was hurt and I used to be careful. It was an open coupling.

Q. In putting lath wood on to the table how close did you come to the coupling?

A. The coupling was in the way of putting wood on the table. I would put it over the coupling.

Q. You heard him speak about a long plank that came down and tilted on his side?

A. Yes.

Q. To shift a plank like that away you would have to lean over the coupling?

A. Yes, you would, but I had not to do anything like that. . . . When I brought the lath wood over to the table and put it on the edger table I had to be careful of the coupling.

Curll, an employee of the company, who had also worked at this point, speaking of crossing, says:—

Q. Did you go over the coupling?

A. No.

Q. To go down into that?

A. No, this side of it.

Q. How far?

A. That is more than I could tell you. Sometimes a foot; sometimes a foot and a half; other times, perhaps, closer.

Q. Did you notice the coupling when doing that work?

A. I never crossed it once that I did not think about it. I would see it every time. . . . I did not want to get too handy to it. That is why I thought about it.

The plaintiff had only been employed by the defendants for 16 or 17 days when the accident happened and was new to the work he had to perform. He had never worked in a saw mill before that.

The learned trial Judge dismissed the plaintiff's action, saying in part:—

> In my opinion the sole cause of the injuries received was the negligence of the plaintiff himself in that he carelessly and negligently attempted to crawl up on the table over a revolving shaft at a point where the shaft was coupled. This was a needless and unnecessary act on his part, etc.

There is no reference in the judgment to the incident of the hemlock plank and the attempted removal of it, which led to the accident. The plaintiff only came in contact with the coupling when he leaned over to push the plank from him. And his successor, Mosher, when he worked there says that the coupling was in the way of putting the lath wood on the table, that he put it over the coupling when he put it on the table. I think that statement is some evidence that the plaintiff might have come in con-

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tact with the coupling without the hypothesis put by the learned Judge of his unnecessarily crawling up on the table over the coupling in order to cross.

In my opinion the plaintiff was in the course of his duty when he attempted to remove that plank out of his way in order to return to his usual station to help to remove it to the chains.

Most of the witnesses in the case are employees of the defendant company, some called by the plaintiff and some by the defendant. Not one of them suggests in what way the plaintiff could have acted differently or that the removal of the plank was an unnecessary thing.

John Curll, the only witness besides the plaintiff who saw the accident, says:—

Q. Did you see Kizer trying to shove the plank over?

A. Yes.

Q. It was a long plank?

A. Yes.

Q. It had slewed towards him?

A. Yes.

Q. Tell us what happened, what you saw?

A. When the plank came down he grabbed it right away. When he came to come up the plank was there yet. He undertook to shove it away. I don't know what for. I don't know his mind.

In cross-examination by the defendant's counsel:—

Q. Was there any occasion for him to pitch it over from that side?

A. I can't tell you.

Q. Was there any necessity for pushing the board when he was on that side?

A. The only necessity I know was that it was in his way.

Q. It was not part of his work to push the board over from that side?

A. I don't know.

The plaintiff says:—

Q. How did the accident occur?

A. I was across at Y. I came over and tripped them ends as there was a piece of lath wood there. When I had the ends tripped there was a piece of lath wood. While I was doing that a two-inch hemlock plank came down D and struck the bumper U, and if I was not at X to catch it it would tail towards W. It did so and I could not get on the table and I was shifting that plank away to get on the table when the coupling caught my overalls about the bib somewhere.

And in cross-examination:—

Q. This deal that was coming down from the edger that you say you leaned over the table to push over to the other side, I understood you to tell Mr. Paton that you pushed that deal over so as to get it out of your way to get up on the table?

A. Yes.

Q. This coupling was right beside the table?

A. Yes.

Q. And this correctly shews the fender?
A. Yes.
Q. Which came right up by the coupling?
A. Yes.
Q. The deal was on the other side of the fender?
A. The deal was this side of the table and I was shifting the deal out of the way to get up on the table.
Q. What kind deal was it?
A. A two-inch plank. I can't tell how long it was. Pretty long. Came down on its flat.
Q. Slipped along on this fender?
A. Yes. It was in my way when I went to go across.
Q. How high does the coupling come above the table?
A. It is not above.
Q. This shaft is in line with the rollers?
A. Yes.
Q. How wide is this coupling?
A. That is more than I can tell you.
Q. The shaft is about an inch and one-half?
A. I forget how big it was. Can't give any idea how big round.
Q. Can't give any idea how big round this coupling was?
A. No.
Q. At all events this shafting was just in the same level with the end of the rollers?
A. I don't remember.
Q. The rollers were above the table?
A. About half of the roller.
Q. This fender would be about six inches higher than the rollers?
A. Yes.
Q. You had to cross that fender?
A. No, could not get over the fender.
Q. Why did you not go above the coupling when you crossed?
A. I don't know why I did not.
Q. Why would you haul yourself on the stomach up over that coupling every time you crossed there?
A. I forget about that.

By the Nova Scotia Factory Act, 1901, ch. 1, sec. 20, it is provided as follows:—

> In every factory (the definition includes such a mill) all dangerous parts of mill gearing (the definition includes this shaft and coupling) shall be as far as practicable securely guarded.

It was quite practicable to guard this shaft with a simple board. To shew that it could be guarded a witness speaks of it as being covered after the accident by a bit of belting.

Then in my opinion it was a dangerous arrangement when it is considered in respect to its locality and the means of crossing and the restricted space.

As long as the person's attention was intent upon it it could be avoided as Curll shews, just as a person avoids striking his head against an overhead structure walking through a window or a door. But if the attention is diverted to something else, as in

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this case, by returning a bit of lath wood and putting a heavy plank out of his way, then it may have been difficult to keep it in mind and thus to avoid it.

In *McCloherty* v. *The Gale Manufacturing Company*, 19 Ont. A.R. 117, the plaintiff was employed in the laundry department of the defendant's factory, and while she was standing on a bench to open a window for the purpose of letting steam and hot air escape, her hair was caught by an unguarded revolving horizontal shaft which passed through the room near the ceiling and in front of the window, and she was severely injured.

It was held by Hagarty, C.J., Osler and Maclennan, JJ.A., Burton, J.A., dissenting, affirming the judgment of the Queen's Bench Division, that she could not be said to have been doing an act so entirely unconnected with her employment and duties as to be regarded as a mere volunteer, and as such outside the protection of the Act, and that there was a defect in the arrangement of the machinery.

It was followed by *Rodgers* v. *Hamilton Cotton Co.*, 23 Ont. R. 425. The latter case, which followed *Baddeley* v. *Earl of Granville*, 19 Q.B.D. 423, is authority also for the position that the defence arising from the maxim *volenti non fit injuria* was not applicable in cases where the injury arises from the breach of a statutory duty on the part of the employer.

I refer also to Beven on Negligence, 3rd ed., p. 645, where the Scotch case of *Kelly* v. *The Glebe Sugar Co.*, 20 Rettie 88 (not available to me) is cited, and to *Thompson* v. *Wright*, 22 Ont. R. 127, and *Groves* v. *Lord Wimborne*, [1898] 2 Q.B. 402.

In my opinion the plaintiff was not guilty of contributory negligence, and the defendant was guilty of negligence under the Employers' Liability Act, R.S. 1900, ch. 179, namely, there was a defect in the arrangement of the work and machinery of which the defendant knew, and the plaintiff merely continued in the employment of the defendant within the meaning of the proviso to sec. 5, ch. 179, R.S. 1900, and is not to be deemed to have voluntarily incurred the risk of the injury.

The judgment should be set aside and the plaintiff should have a judgment for damages, which in my opinion should be assessed at the sum of $500, with costs of appeal and of the action.

Russell, J.

RUSSELL, J.:—I should agree to the decision of the learned trial Judge if I understood the facts as he did. But I cannot so read the evidence. The plaintiff, a new hand at the work, was placed in a position where it was his duty at frequent intervals to climb up on a table, cross over it and climb down again into a place surrounded by tables or benches, which allowed him a space of about four feet by two in which to work at what he calls tripping deal ends or some such pieces of lumber into

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hole through which they were supposed to fall to be cut into laths, as I understand. While there working he had to be careful not to get caught and thrown down by lumber coming along on endless chains, fitted with dogs to catch the boards and hold them on their way to the piling place. These chains with their load came along about winding between his feet and his knees and if he did not jump clear of them from time to time as they came along he would be caught and thrown down. Two or three feet from the floor were the tables on which the lumber was being trimmed. Along the length of the tables ran a shaft, which was pierced at some point of the space within which he was working, the ends being joined by means of flanges, about six inches in diameter, fastened by bolts and square heads at one end and nuts on the screw at the other end of the bolt. While he was working a two-inch plank came down the tables next to him, and when an end of it struck the fender on the table, which was designed to guide it as it moved across to the edge of the table farthest from the plaintiff, the other end was naturally tilted over towards the plaintiff, and more or less across the space in which he was working. In the endeavour to remove this plank in order to climb out of the hole and resume his sawing, he got caught in some way on the revolving shaft, and there can be no doubt whatever that it was because of the protruding nuts or bolt heads that this happened. The consequence was that he was badly injured before he could be rescued.

The learned trial Judge finds as a fact that he was thus injured because instead of getting up out of the hole by stepping on the chain guards and thence to the table, he tried to climb up over the shaft at the point where it was joined by these flanges and screw bolts. There is no evidence of this fact except in the question asked by counsel in which this is assumed. On the contrary, the plaintiff's explanation of the accident is the one I have already given. It is supported by the only other witness who saw what happened and there is no contradiction whatever of it by anyone. He had not begun to climb out of the hole when the flange caught him. He was removing a plank that was in his way, as he had a perfect right to do, and was under obligation to do, in order to resume his work at the saw. I think that under the circumstances the shaft with its flange and protruding nuts, and probably protruding screws (though there was no evidence as to them), was a dangerous part of the mill gearing and machinery, and that it was not as far as practicable securely guarded. The failure to so guard it was a breach of sec. 20 of the Factories Act, ch. 1, of 1901, and the defendants are liable for the consequences.

Ritchie, J.

RITCHIE, J.:—This is an action to recover damages for personal injuries. The learned trial Judge has found that the

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plaintiff's injuries were caused by his carelessness and negligence in attempting to crawl upon the table over the open revolving shaft. If the evidence supported this finding the case would be one of contributory negligence and the plaintiff could not recover. I am, however, unable to concur in this finding. It is clear that the plaintiff in the discharge of his duty was obliged to cross and recross the table. He had crossed the table and in order to return it was necessary for him to guide a plank out of his way, and in doing so he got caught in the coupling of the revolving shaft. The facts covering the happening of the accident, the position of the plaintiff at the time, and the condition, situation and character of the machinery and the manner in which it worked, as disclosed by the evidence, are in my opinion correctly set out in the judgment of my brother Graham, and it is not necessary for me to repeat what he has said in this regard. The accident happened very quickly and no witness contradicts the plaintiff as to how it happened, and his evidence seems to me, in view of the existing conditions, perfectly reasonable. So far as I can discover, the only evidence upon which the learned trial Judge finds that the plaintiff "carelessly and negligently attempted to crawl up on the table over a revolving shaft at the point where the shaft was coupled," is to be found in the cross-examination of the plaintiff and is as follows:—

"Q. Why would you haul yourself on the stomach up over the coupling every time you crossed there?

"A. I forget about that."

The question assumes a state of facts of which there is no evidence. The plaintiff cannot, I think, be said to have assented to the statement suggested by the question, and to do so would be directly at variance with his account of the accident. As I have in this opinion stated, no witness contradicts the plaintiff as to how the accident happened. On the contrary, in some details, he is corroborated. I have to respectfully differ from the learned trial Judge on this question of fact and hold that there was no contributory negligence on the part of the plaintiff. The next question for consideration is as to the negligence of the defendant company. In my opinion the company was guilty of negligence in allowing the coupling and revolving shaft to run open and unguarded in the place and under the conditions disclosed by the evidence. It is obvious that it was dangerous machinery, and I think it is equally clear that all danger would have been removed by having the shaft and coupling covered at small expense. It was not suggested in the evidence or at the argument that there was any difficulty about doing this, and I have no difficulty in drawing an inference of fact in regard to it. It was not suggested by the defendant's counsel and could not be reasonably suggested that it was not

practicable to securely guard this revolving shaft and coupling. The mill and premises of the defendant company is a "factory" within the meaning of sec. 2, sub-sec. (*a*) of the Nova Scotia Factories Act. By sec. 20, sub-sec. (*a*) all dangerous parts of mill gearing, machinery, etc., shall be, as far as practicable, securely guarded. By sec. 2, sub-sec. 10, "mill gearing" comprises "every shaft, whether upright, oblique or horizontal."

The revolving shaft and coupling were not guarded at all; the injuries to the plaintiff are the result. It is a case of breach of a statutory duty on the part of the defendant company, with injuries resulting to the plaintiff from such breach. The liability of the defendant company in a case of this kind in my opinion, under the authorities is abundantly clear. I do not make the broad statement that in every case where a statutory duty is created any person who can shew that he has sustained injuries from the non-performance of that duty, can sustain an action for damages against the person on whom the duty is imposed. I think where a statute imposes a duty and provides a penalty for breach of the duty, in order to ascertain whether a man who is injured by a breach of the statutory duty has a right of action it is necessary to consider the language and object of the particular statute. In this case the object of the statute is the protection of persons working in factories, and I think the intention of the Legislature was to create a liability for their benefit. The penalties under the statute, it is to be noted, go to the Province. In this connection I refer to *Vallance* v. *Falle*, 13 Q.B.D. 109; *Groves* v. *Lord Wimborne*, [1898] 2 Q.B. 402.

The case of *Sault Ste. Marie Pulp and Paper Co.* v. *Myers*, 33 Can. S.C.R. 23, is a clear authority in favour of the plaintiff in this action on the question of negligence. It also extends the doctrine of common employment in a case of this kind. Consequently the plaintiff's right to recover in this action is not in any way dependent upon the Employers' Liability Act.

However, I may add that if this was a case under the Employers' Liability Act, I think the plaintiff would be entitled to recover on the ground that the shaft and coupling being unguarded, was a defect within the meaning of sec. 3, sub-sec. (*a*) of the Employers' Liability Act.

The counsel for the defendant company disputes the plaintiff's right to recover on the ground that, knowing of the danger, he assumed the risk. I think the answer to this is that the injury was caused by the violation by the defendant company of a statutory duty and that therefore the maxim *volenti non fit injuria* does not apply.

In *Thomas* v. *Quartermaine*, 18 Q.B.D. 685, at p. 703, Fry, L.J., said:—

> Knowledge is not of itself conclusive of the voluntary character of the plaintiff's actions; there are cases in which the duty of the master

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exists independently of the servant's knowledge, as where there is a statutory obligation to fence machinery.

The English authorities on this point are to be found in 1 Beven on Negligence, 3rd ed., p. 644.

I would allow the appeal with costs.

MEAGHER, J., announced that he had written an opinion which he would not read.

Appeal allowed with costs.

Annotation

Master and servant

Annotation—Master and servant (§ II B 9—181)—Employer's liability for breach of statutory duty—Assumption of risk.

The distinction between a breach of duty at common law and the breach of a statutory duty was discussed by Bowen, L.J., in *Thomas* v. *Quartermaine*, 18 Q.B.D. 685, 696, where he said:—

"It is plain that mere knowledge may not be a conclusive defence. There may be a perception of the existence of the danger without comprehension of the risk; as where the workman is of imperfect intelligence, or, though he knows the danger, remains imperfectly informed as to its nature and extent. There may again be concurrent facts which justify the inquiry whether the risk though known was really encountered voluntarily. The injured person may have had a statutory right to protection, as where an Act of Parliament requires machinery to be fenced. The case of *Clarke* v. *Holmes*, 7 H. & N. 937, 31 L.J.Ex. 356, is a case of that sort, and has been so explained subsequently by Judges of authority.

"The defendant in such circumstances does not discharge his legal obligation by merely affecting the plaintiff with knowledge of a danger which, but for a breach of duty on his own part, would not exist at all."

Fry, L.J., in the same case, *Thomas* v. *Quartermaine*, 18 Q.B.D. 685, at p. 703, also alludes to the distinction, saying: "Knowledge is not, of itself, conclusive of the voluntary character of the plaintiff's actions; there are cases in which the duty of the master exists independently of the servant's knowledge, as when there is a statutory obligation to fence machinery."

The Irish Exchequer Chamber had expressed this conclusion very clearly some seventeen years previously in *Hoey* v. *Dublin and Belfast Junction Ry. Co.*, 5 Ir.R., C.L., 206: Beven on Negligence, 3rd ed., 644.

Mr. Beven says: "The reasonable conclusion from these *dicta* is that, where a statutory duty exists, the maxim *volenti non fit injuria* is not to be presumed to avail, or, as Wills, J., says in his judgment in *Baddeley* v. *Earl Granville*, 19 Q.B.D. 423, would not apply (*i.e.*, *primâ facie*) at all where the injury arose from a direct breach by the defendant of a statutory obligation."

In *Baddeley* v. *Earl Granville*, 19 Q.B.D. 423, through breach of a statutory duty imposed by the Coal Mines Regulation Act, 1872, 35 and 36 Vict. ch. 76, the plaintiff's husband was killed; and, in an action under the Employers' Liability Act, 1880 (Imp.), it was held that the maxim *volenti non fit injuria* was not applicable where the injury was from the breach of a statutory duty on the part of the employer. It should be pointed out that, on the facts of the case, the defendant was liable in any event; since, a statutory duty being shewn to exist and to have been

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Master and servant

Annotation (*continued*)—Master and servant (§ II B 9—181)—Employer's liability for breach of statutory duty—Assumption of risk.

neglected, the defendant had not "dispensed with the performance of it" within the meaning of Baron Bramwell's decision in *Britton* v. *Great Western Cotton Co.*, 41 L.J.Ex. 102, and therefore the decision is sustainable quite independently of the actual leading reason alleged for it: Beven on Negligence, 3rd ed., 645.

In *Thompson* v. *Wright*, 22 Ont. R. 127, Boyd, C., discussing the effect of a failure to guard dangerous machinery within the provisions of the Ontario Factory Act, describes the failure as "*per se* evidence of negligence"; and the phrase is accepted in a string of cases as expressing the determination of the Courts not to interfere with the verdicts of juries acting on the view that the maintenance of unguarded machinery is negligence, though the condition of the machinery in other respects is unexceptionable. In *James* v. *Westinghouse Brake Co.* (*The Times Newspaper*, February 1, 1898), cited in Beven on Negligence, 3rd ed., 645, the proposition that neglect to fence a dangerous machine from which an accident happens is actionable negligence was disputed on the same ground as in *Groves* v. *Lord Wimborne*, [1898] 2 Q.B. 402, that a penalty was imposed for the neglect, in which latter case the Court held that where "there has been a failure in the performance of an absolute statutory duty," "there is no need for the plaintiff to allege or prove negligence on the part of any one in order to make out his cause of action."

On the other hand, proof of a breach of statutory duty to fence machinery does not disentitle those guilty of it to set up the defence of contributory negligence: *Ilex* v. *Abercarn Welsh Flannel Co.*, 2 Times L.R. 547. Cp. *Groves* v. *Lord Wimborne*, [1898] 2 Q.B. *per* Williams, L.J., 419.

And in the Scotch case of *Kellu* v. *Glebe Sugar Refining Co.*, 20 Rettie, Scottish Reports, 833, the protection of the Factory Acts, 1878 and 1891, was held to extend to every person employed in the factory; so that there is no necessity that, at the time of the happening of an accident, the injured person should be actually engaged in the performance of his duty.

Mr. Beven summarizes the law on this point in the following three propositions:—

1. Where the risk is plain and apparent at the time of entering on the employment, the presumption of law is that the workman enters on the employment on the terms of encountering the risk, even though, in fact, he has no knowledge of it.

2. Where the risk is superadded after the commencement of the employment, the presumption of law is, that the workman does not undertake the work subject to the risk, till it appears that he has actual knowledge and a full appreciation and has continued in his employment, so knowing of and appreciating the risk; and not even then if his continuance in the employment is explained by other circumstances, *e.g.*, a promise to remove the danger: *Smith* v. *Baker*, [1891] A.C. 325. There is a manifest difference between continuing to work with knowledge of a danger without complaint, and after complaint pending the application of a promised remedy.

3. When the master is under a statutory liability to take precautions in any particular work, the presumption of law is that, as between the master and the workman, the fact of the workman working in the absence of the statutory safeguards does not discharge the master from his liability

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Annotation

Master and servant

Annotation (*continued*)—Master and servant (§ II B 9—181)—Employer's liability for breach of statutory duty—Assumption of risk.

to compensate the workman for injuries sustained through the master's neglect to provide the statutory safeguards; and this presumption can only be rebutted by proof of an undertaking of the employment by the workman with a knowledge of the risk involved, and of the master's duty in respect thereof: *Thomas* v. *Quartermaine*, 18 Q.B.D. 685; *Dominion Iron & Steel Co.* v. *Day*, 34 Can. S.C.R. 387, 392. For the law in the United States see *Kohn* v. *M'Nulta*, 147 U.S. (40 Davis) 238; *Union Pacific R. Co.* v. *McDonald*, 152 U.S. (45 Davis) 262.

The workman can, however, definitely contract to undertake risks, and in what circumstances, unless he is prohibited by any statute: *Redgrave* v. *Allan*, L.R. 4 P.C. 511. And he is prohibited when a penalty is imposed for doing or omitting the act which is the subject of legislation: *In re Cork and Youghal R. Co.*, L.R. 4 Ch. 758.

Lord Hatherley there said: "Everything in respect of which a penalty is imposed by statute must be taken to be a thing forbidden, and absolutely void to all intents and purposes whatsoever."

The workman is not prohibited from contracting to undertake the risk where the statute merely makes a contract for him and in doing so does not state that it shall operate notwithstanding any agreement to the contrary, nor impose any general rule of conduct, but confines itself to presuming a benefit for either an individual or a class: *Griffiths* v. *Earl of Dudley*, 9 Q.B.D. 357; *Smith* v. *Baker*, [1891] A.C. 344; *Membery* v. *Great Western R. Co.*, 14 A.C. 179, 4 Times L.R. 265, 58 L.J.Q.B. 563; *Dublin, Wicklow and Wexford R. Co.* v. *Slattery*, 3 A.C. 1155; *Wakelin* v. *London & S.W. R. Co.*, 12 A.C. 48.

Contributory negligence may be a defence to an action founded on a breach of statutory duty: *Dego* v. *Kingston and Pembroke Ry. Co.*, 8 O.L.R. 588 (C.A.).

Where a guest in a burning hotel is injured in consequence of the proprietor having failed to provide the means of fire escape required by the Fire Escape Act, an action for damages will lie against the proprietor notwithstanding that a penalty is imposed for breach of the statutory duty: *Love* v. *Fairview*, 10 B.C.R. 330; *Groves* v. *Lord Wimborne* (1898), 2 Q.B. 402, applied.

The defence arising from the maxim *volenti non fit injuria* (the guest being aware of the lack of means of fire escape and having made no objection) is not applicable where the injury arises from a breach of a statutory duty: *Love* v. *Fairview*, 10 B.C.R. 330; *Baddeley* v. *Earl Granville* (1887), 19 Q.B.D. 423, applied. The fact that the guest delayed his exit in order to rescue a fellow-guest and thereby lost his own chance of getting out safely is not a matter of law "contributory negligence"; whether the plaintiff did anything which a person of ordinary care and skill would not have done under the circumstances or omitted to do anything which a person of ordinary care and skill would have done, and thereby contributed to the accident, was for the jury to decide: *Love* v. *Fairview*, 10 B.C.R. 330.

The rule of law as to contracting out of a liability imposed by statute is discussed by Mr. Beven (Beven on Negligence, 3rd ed., p. 725), and he thus summarizes the authorities: The maxim of law is *quivis renuncare potest juri pro se introducto; Bovill* v. *Wood*, 2 M. & S. 25, *per* Bayley, J. or as it appears in Cod. 2, 3, 29; *Omnes licentiam habere, his quæ pro*

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Master and servant

Annotation (*continued*)—Master and servant (§ II B 9—181)—Employer's liability for breach of statutory duty—Assumption of risk.

se introducta sunt, renunciare. Cp. *Wilson* v. *McIntosh*, [1894] A.C. 133, 4 Bl. Comm. 317; *Great Eastern Ry. Co.* v. *Goldsmid*, 9 App. Cas. 936, *per* Lord Chancellor Selborne, where the form is, *unusquisque potest renunciare juri pro se introducto;* and *Enohin* v. *Wylie*, 10 H.L.C. 15, *per* Lord Westbury, where the form is, *cuique competit renunciare juri pro se introducto.*

In *Rowbotham* v. *Wilson*, 8 E. & B. 151, Martin, B., says: "I cannot perceive any reason, either at law or otherwise, why parties should not be at liberty by apt words, either to add to, or qualify, or make more or less extensive, the right which the law of itself provides and imposes, or, if they think fit, declare that such rights shall not exist at all. *Quilibet potest renunciare juri pro se introducto.*"

Again in *Rumsey* v. *N. E. Ry. Co.*, 14 C.B. (N.S.) 649, Erle, C.J., says: "It is undoubtedly competent to any man to renounce a privilege which is given to him by a statute." Lord Westbury draws attention to the words *pro se* in the maxim, which he says have been introduced to shew that "no man can renounce a right which his duty to the public, which the claims of society, forbid the renunciation of": *Hunt* v. *Hunt*, 31 L.J. Ch. 175. See also *Markham* v. *Stanford*, 14 C.B.N.S. 383, *per* Byles, J.; *Morten* v. *Marshall*, 2 H. & C. 305. The maxim as to this is, *pactis privatorum publico juri derogari nequit*; *Swan* v. *Blair*, 3 Cl. & F. 621, or as it elsewhere appears *non derogatur*.

In *Printing and Numerical Registering Co.* v. *Sampson*, L.R. 19 Eq. 465, Jessel, M.R., says:—

"It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by Courts of justice."

This passage is cited and approved by Fry, L.J., *Rousillon* v. *Rousillon*, 14 Ch. D. 365, and by Chitty, J., *Tallis* v. *Jacson*, [1892] 3 Ch. 445; Holmes, The Common Law, 205. See also *Wallis* v. *Smith*, 21 Ch. D. 266, *per* Jessel, M.R. As to the argument of "public policy," Burrough, J., says, *Richardson* v. *Mellish*, 2 Bing. 252: "I, for one, protest, as my Lord has done, against arguing too strongly upon public policy; it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail." Even more forcible are the words of Mr. Pierpoint *arguendo*, in *The King* v. *Hampden*, 3 How. St. Tr. 1293; see also Lord Mansfield, C.J., *Wilkes's Case*, 19 How. St. Tr. 1112.

"Public policy," as a ground of legal decision, is exhaustively treated in the leading case of *Egerton* v. *Earl Brownlow*, 4 H.C.L. 1. Pollock, C.B., in advising the Lords, summarises the cases as establishing the distinction, "that where a contract is directly opposed to public welfare it is void, though the parties may have a real interest in the matter, and an apparent right to deal with it."

See also *per* Bowen, L.J., in *Maxim Nordenfeldt, etc., Co.* v. *Nordenfeldt*, [1893] 1 Ch. 665, affirmed in the House of Lords, [1894] A.C. 535; and *per* Lord Halsbury; *Janson* v. *Driefontein Consolidated Mines*, [1902] A.C. 491, citing *In re Fitzgerald*, [1904] 1 Ch. 573.

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JONES v. CANADIAN PACIFIC R. CO.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. June 18, 1912.

1. MASTER AND SERVANT (§ II A 4—105)—LIABILITY OF RAILWAY CO.—ENGINEER RUNNING A SNOW PLOUGH—PROCEEDING IN ABSENCE OF CROSSING OR STATION SIGNALS—WORKMEN'S COMPENSATION ACT (ONT.) R.S.O. (1897) CH. 160.

A case for compensation under the Workmen's Compensation Act, R.S.O. 1897, ch. 160, but not a case at common law, is shewn where an engineer in charge of a locomotive propelling a snow-plough ran it for some time without ascertaining why crossing or station signals were not being given by the signalman on the plough, and a collision with another train resulted, in which the fireman of such locomotive was killed.

2. DEATH (§ III—20)—RAILWAY FIREMAN—LIABILITY OF RAILWAY—NEGLIGENCE OF ENGINEER—ABSENCE OF SIGNALS—COMMON LAW.

A railway company is not liable at common law for the death of the fireman of a locomotive that was propelling a snow-plough, as the result of a collision with another train, due to the negligence of the engineer in charge of the engine in continuing to run it without attempting to learn the cause of the failure of the signalman on the plough to give crossing and station signals, where no negligence on the part of the signalman was shewn, as the engineer whose negligence caused the accident was the deceased's fellow-servant.

3. APPEAL (§ VII L 2—476)—REVIEW OF FACT—VERDICT AGAINST RAILWAY FOR NEGLIGENTLY CAUSING DEATH—ABSENCE OF EVIDENCE TO SUPPORT JURY'S FINDING.

A verdict of a jury in favour of the plaintiff in an action against a railway company for negligently causing the death of the fireman of a locomotive that was propelling a snow-plough, cannot be sustained where there was no evidence tending to support the jury's finding that his death was due to the negligence of the railway company in operating the plough under a defective system by placing it in charge of a servant who had not passed the necessary eye and ear test, or to shew that the accident was due to a defect in the hearing or vision of such person.

4. COLLISION (§ I—3)—FIXING LIABILITY—DEATH OF RAILWAY FIREMAN ON SNOW-PLOUGH—UNQUALIFIED SIGNALMAN.

A railway company cannot be held liable for the death of a fireman on a snow-plough train as a result of a collision, merely because it employed an unqualified signalman on the snow-plough, where it did not appear that an accident was the result of his disqualification.

5. MASTER AND SERVANT (§ II A 2—47)—DUTY OF RAILWAY IN RESPECT TO RULES AND REGULATIONS—EFFECT OF VIOLATION OF RULES—WHAT MUST BE PROVED BEFORE RECOVERY.

In order to entitle the plaintiff to recover from a railway company for negligently causing the death of a locomotive fireman as the result of a defective system of operating a snow-plough, which was being propelled by the locomotive at the time of the accident, by placing a signalman on the plough who had not passed the necessary eye and ear test, and an examination as to train rules, it must appear that such negligence was the proximate cause of his death.

Statement

APPEAL by the defendants from the judgment of Clute, J., upon the findings of a jury, in favour of the plaintiff, the administratrix of the estate of Gilbert Jones, who was an engine-fireman in the defendants' service, and, when acting as such upon a snow-plough train, was killed in a collision, to recover damages

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for his death. The plaintiff alleged negligence on the part of the defendants.

The questions left to the jury and their answers were as follows:—

1. Were the defendants guilty of negligence that caused the death of Gilbert Jones? A. Yes.

2. If so, what was the negligence? A. By not having a competent employee in charge of snow-plough train.

3. Did the defendants permit Weymark (signalman) to engage in the operation of the train on which Jones was when he came to his death, without first requiring such employee to pass an examination in train rules and undergo a satisfactory eye and ear test by a competent examiner? A. Yes.

4. Did the plaintiff suffer the damage complained of thereby? A. Yes.

5. Did the deceased come to his death by reason of the defendants operating the railway by a negligent system? A. Yes.

6. If so, what was the negligent system? A. By allowing Weymark to operate snow-plough train without having passed the eye and ear test.

7. Might the deceased Gilbert Jones have avoided the accident by the exercise of reasonable care? A. No.

And the jury assessed the damages at $6,000, for which sum judgment was given in favour of the plaintiff with costs.

The appeal was allowed and a new trial ordered.

I. F. Hellmuth, K.C., and *Angus MacMurchy*, K.C., for the defendants.

Sir George C. Gibbons, K.C., for the plaintiff.

Meredith, J.A.

The judgment of the Court was delivered by MEREDITH, J.A.:—There was, in my opinion, a mistrial of this case; it was not presented to the jury as it should have been; and, consequently, the jury's findings are inconclusive. No objection was made, on either side, in this respect; and so it may fairly be said, as it was in the plaintiff's behalf, that the verdict ought to be sustained, and held to be sufficient to support a judgment in the plaintiff's favour, if, in any way, reasonably it can. But I am unable to find any such way; or to understand how anything more can be done for the plaintiff than to direct a new trial, if she remains unwilling to accept the judgment which the defendants are willing she should have.

Liability under the Workmen's Compensation for Injuries enactments is admitted by the defendants; and was, I think, conclusively proved through the negligence of the engineer in charge of the locomotive engine which was propelling the train. Although signals had been regularly given by the signalman on the snow-plough until the first highway level crossing after passing Schaw station was passed; no signal of any character

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came from the snow-plough from that on until the accident; none for any other of the level highway crossings; none though the train ran through McRae station; and none for Guelph Junction station, though the train had passed both distant and near semaphores, and was in the station-yard, when the accident occurred.

Failing to get from time to time the signals which should have come from the snow-plough, what possible excuse can the engineer, or indeed the conductor, have for forging ahead over level crossings, past one stopping-place, and into the yard of the next, without making the least effort to learn the cause of such obvious and dangerous failure to give the necessary warnings of the approach of the train, a train not running on "schedule time," and a snow-plough train at that? The engineer must have known that something was wrong: and there should have been signals from time to time; even if he were blind, he must have known that. The difficulty which the findings occasion are primarily the result of insufficient questions; the jury were not asked whose negligence was the proximate cause of the disaster. No just judgment can be given, in the plaintiff's favour at all events, until the real cause of the accident has been found. If it were, as the defendants admit, the negligence of the engineer, the damages awarded by the jury must be reduced; if it were negligence on the part of the signalman, not arising from defective hearing or eyesight, a mere question would arise as to the measure of such damages—whether they are limited under the enactments I have mentioned or not—if the plaintiff would be entitled to any.

It may be that the crucial question was avoided in the fear that it might involve a finding under which the plaintiff would be limited to damages under the enactments; but, whether so or not, this case is another one illustrating the needs for conformity with the usual questions aimed at eliciting all the material facts, irrespective of what the legal result of the whole truth may be.

The jury were evidently under the impression that the employment of an unqualified signalman made the defendants answerable for all the mishaps of the train arising in any way from want of proper signals from him; a view which, instead of being dispelled, may, I fear, have had some sort of encouragement from the trial Judge, his charge upon the more vital part of it being in these words: "As I understood the argument of the defence upon that point, it was suggested that, even although there might be (he did not admit that there was) a breach of that rule, yet it was not the breach of that rule which caused the injury which caused the death; that the death was not the natural result, was not the proximate cause. Well, that is for

you to say. Should that train have been sent out at all, if you find it was not under competent management? Should they have directed or permitted Jones to go out with that train, if it was not properly manned? Did it devolve upon them, if they chose to disregard the order of the Board, to see that no accident should occur? Did they not, in fact, assume the risk of a safe conveyance of their servant, if they chose to disregard the order of the Board which directed what was to be done for that safety?"

That, I have no doubt, contains a good deal of misdirection, and misdirection which has a bearing upon the question of a new trial, even though misdirection not objected to.

The jury ought to have been plainly told that a mere breach of the rule did not give a right of action under it, that there must not only be a breach of the rule, but also injury flowing from it, to give a right of action such as this. They ought to have been plainly told, if they were told anything upon the subject, that, unless the accident was caused by the incapacity or negligence of the signalman, the plaintiff had no right of action under the rule.

The jury did not find that the accident was caused by any such incapacity or negligence; and so the verdict which is based upon the rule alone cannot stand. I cannot think that they meant to find that either the hearing or sight of the signalman was defective; but, if they did, there was no evidence upon which reasonable men could so find. They make no distinction between sight and hearing; the ear test is as prominent in their findings as the eye test; and yet it is very plain that the signalman was not deaf; if he had been, all who came in contact with him would have known it; and it is also obvious that defective hearing could not have had anything to do with the accident. But it was argued that the man may have been colour-blind; if he were, some attempt at least should have been made to prove it; it is not likely that it could have existed in a railway servant without some one knowing something about it in some way—his wife, his relatives, and his fellow-workmen; the examination which he did pass is opposed to any such notion; so, too, as to colour-blindness being the cause of the accident; colour-blindness would not have prevented his seeing the colourless highway, the semaphores, switches, and buildings, all calling for a signal which was not given. Colour-blind or not, he could have seen the semaphores; and, no matter what he might have deemed the colour of their lamps, it was equally his duty to signal the approach to Guelph Junction station. Whatever, then, may have been the cause of silence at these points, and at the highways, it was not colour-blindness. So that in these two respects there

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was not only no reasonable evidence, but, in my opinion, not a scintilla of evidence.

If there had been any reasonable evidence that colour-blindness was the cause of the accident, and if the jury had found that it did cause it, the judgment in the plaintiff's favour—subject to any question as to excessive damages—ought to stand; whilst, if there were reasonable evidence that the accident was caused by some negligence of the signalman, apart from any want of qualification required by the rule, and if the jury had found that it was so caused, the question would arise whether the plaintiff's damages—if entitled to any—should be limited, under the enactment I have mentioned, or not; a question better not dealt with until it necessarily arises. But neither is the case.

Upon the whole evidence, it might reasonably be found that the accident was not caused by any want of qualification or negligence on the part of the signalman; and in that case the defendants' liability would be limited, because, as the defendants admit, the accident was caused, not by any breach of the rule, which it is admitted has the effect of an enactment, but by the negligence of the engineer, a fellow-workman in common employment with the man in respect of whose death this action is brought.

It is quite within the range of possibility, if not extremely probable, that the failure to signal after the last of the series of signals, duly given from Woodstock to the first highway after passing Schaw, was caused by some injury to, or displacement of, the signalling machinery, which the signalman had not power to correct, or indeed may possibly not have known of, on account of the noise of the snow-plough in which he was cooped up; or it may be by reason of some accident or illness suddenly incapacitating the man; things which shew the gross want of care on the part of him who had control of the motive power of the train in the engine, as well as of the conductor of the train.

The plaintiff, having failed to establish a claim at common law, as it is called, might, in strictness, have her action dismissed if she refuse to accept—as she does—the offer of judgment under the Workmen's Compensation for Injuries Act; but that would be a harsh method of procedure; for the Court, as well as the parties, is to blame for the failure to elicit at the trial all the facts needful for a consideration of the plaintiff's claim in all its aspects.

I would, therefore, allow the appeal; and direct a new trial. The plaintiff should pay the costs of this appeal in any event: the other costs wasted may not unfairly be costs in the action.

New trial ordered.

MANITOBA LUMBER CO. Ltd. v. EMMERSON.

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British Columbia Supreme Court. Trial before Gregory, J. March 18, 1912.

1. MERGER (§ VII—30)—ASSIGNMENT OF TIMBER BERTH — SUBSEQUENT MORTGAGE—ABSENCE OF REFERENCE TO ASSIGNMENT.

An absolute assignment of a timber berth which was intended as a mortgage, was superseded by a mortgage given for a greater amount, which included the indebtedness covered by such assignment, without mentioning the assignment.

2. MORTGAGE (§ VI G 2—106)—SUSPENSION OF POWER OF SALE—MORTGAGEE IN POSSESSION PURSUANT TO AGREEMENT—EXTENSION OF TIME.

A mere extension of the time of payment and not an absolute sale of encumbered property to a mortgagee, was effected where a saw-mill and its appurtenances were turned over to him under an agreement whereby his power of sale was suspended, and he was to operate the mill, paying the mortgagor a fixed monthly rental, the latter retaining an option to take back the property within nine months on certain conditions, and it was also agreed that a transfer of such property, which was given the mortgagee, should not be recorded except in the event of a sale of the property in the manner specified in such agreement, or upon the institution of suits against the mortgagor, or upon his not redeeming the property, and it was further stipulated that the mortgagee's rights should be those of a mortgagee in possession, and that nothing in the agreement should impair such right.

[*Davis* v. *Thomas*, 1 R. & My. 506, and *Bastin* v. *Bidwell*, L.R. 18 Ch. D. 238, 247, distinguished.]

3. MORTGAGE (§ I E—22)—RIGHTS AND LIABILITIES OF MORTGAGEE IN POSSESSION—REPAIRS—RESERVATION OF RIGHT TO REDEEM—IMPROVEMENTS AFTER NOTICE OF INTENTION TO REDEEM.

Only ordinary and necessary repairs to encumbered property are within the purview of an agreement by which a mortgagee was placed in possession of a saw-mill property, as a mortgagee in possession, the mortgagor reserving the right to redeem upon paying the costs of improvements made by the mortgagee while in possession, and the mortgagor cannot be required to pay, either under the terms of such agreement, nor as appurtenant to the rights of a mortgagee in possession, $106,000 for improvements consisting of the erection of a new and different mill in place of a practically new one that was torn down, a large portion of such expense being incurred after the expiration of the time for redemption and notification by the mortgagor of his intention to redeem, and his repudiation of liability for such extensive improvements, and after the launching by him of an action for redemption.

[*Carrol* v. *Robertson*, 15 Gr. Ch. (Ont.) 173; *Brotherton* v. *Hetherington*, 23 Gr. Ch. (Ont.) 187; *Shepard* v. *Jones* (1882), 21 Ch. D. 469; *Henderson* v. *Astwood*, [1894] A.C. 150, distinguished.]

4. EVIDENCE (§ II E 5—169)—PRESUMPTION AS TO ACQUIESCENCE OF CORPORATION—MANAGER RESIDING IN NEIGHBOURHOOD OF MORTGAGED PREMISES—EXTENSIVE IMPROVEMENTS BY MORTGAGEE IN POSSESSION.

Acquiescence of the manager of a mortgagor in the making of extensive improvements on encumbered property by a mortgagee who was in possession, cannot be inferred from the fact that the former lived in the immediate neighbourhood of the property and was aware of such improvements, where he did not object thereto for fear that the mortgagee would sell under the power in his mortgage.

[*Shepard* v. *Jones*, 21 Ch. D. 469, referred to.]

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5. MORTGAGE (§ VII—162)—REDEMPTION—EFFECT OF—LIABILITY OF MORTGAGEE IN POSSESSION TO ACCOUNT FOR PROFITS—PAYMENT TO MORTGAGOR OF MONTHLY RENTAL.

A mortgagor upon redeeming, is not entitled to an account of the rents and profits from a saw-mill property of which the mortgagee was in possession under an agreement which required him to pay the mortgagor a stated monthly rental for the property during the time he was in possession.

6. EVIDENCE (§ II K 1—316)—BURDEN OF PROOF IN SHEWING MORTGAGEE IN POSSESSION HAD PURCHASED THE EQUITY OF REDEMPTION.

The onus rests upon a mortgagee in possession of encumbered property of shewing that he had purchased the mortgagor's equity of redemption, since "once a mortgage, always a mortgage."

Statement

TRIAL of an action by the plaintiff to recover possession of a certain timber berth No. 290, and for a declaration that the plaintiff is entitled to redeem a certain mill property at Eburne, after taking accounts and payment of the amount found to be due to the defendant, and for directions as to the method of taking such accounts.

Judgment was given for an account, further directions being reserved.

J. A. Russell and *Macdonald*, for plaintiff.

A. D. Taylor, K.C., and *D. G. Macdonell*, for defendant.

Gregory, J.

GREGORY, J.:—The timber berth was absolutely assigned to defendant by indenture dated 22nd July, 1907, in consideration of one dollar; but it is admitted by defendant that though absolute in form, it was in reality a mortgage to secure the repayment of $5,500, consisting of a small indebtedness and moneys to be advanced in the future. On the 28th September, 1907, defendant agreed to assist plaintiff by guaranteeing certain bank indebtedness and in other ways; plaintiff was to secure same by a mortgage for $30,000, which included the said sum of $5,500, and accordingly gave defendant a mortgage (exhibit 7) payable in three months over the mill property in question. This mortgage contains no reference to the mortgage on the timber berth, and so far as the evidence goes, it does not appear that any reference was made to it at the time. I therefore assume that it was superseded by the new mortgage which furnished ample security for the entire indebtedness, etc. At the conclusion of defendant's argument, I asked his counsel under what he now claimed the timber berth which he had not touched upon in his argument, and he replied that he "could not support" his claim to it, but he "would not formally abandon it." This I treat as an admission that plaintiff is entitled to the relief asked for to that extent at least, and there will be judgment accordingly with costs.

The balance of the plaintiff's claim is not so easily disposed of, and it is necessary to consider fully all the circumstances.

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When the mortgage (exhibit 7) matured on the 31st December, 1907, plaintiff was unable to pay it as defendant knew would be the case, but he allowed it to run until the 25th September, 1908, when plaintiff's indebtedness having grown to about $51,000, he served it with notice (exhibit 8) that he would enter into possession and take the rents and profits and sell, etc., unless the moneys due were paid within ten days, which he well knew the plaintiff could not do.

This notice, dated 24th September, 1908, was accompanied by the following letter, dated 25th September, 1908:—

Vancouver, B.C., Sept. 25th, 1908.

The Manitoba Lumber Company, Limited.,
Eburne, B. C.

Sirs,—As you are in default in the payment of the mortgage for $30,000 given to me on the 28th day of September, 1907, I have given notice to you of my intention to exercise my power of sale *and other powers* provided for in the mortgage unless within the period of ten days from the notice as stipulated in the mortgage, you repay the mortgage money and interest.

In view of your present circumstances I do not suppose that you can make arrangements to repay the amount due and I will therefore be in a position at the expiration of the ten days to exercise the power of sale and other powers contained in the mortgage.

I am, however, disposed to give you a further opportunity of paying the amounts due to me and redeeming the property and make the following proposal:—

1. Your company to consent to my *taking possession* forthwith *under the mortgage*, in other words, that you waive the balance of the ten days' notice. I will also take possession of the logs, sawn lumber and book debts which belong to me under our arrangement respecting the sale of logs and which you have been heretofore holding as representing me.

2. I will operate the mill as I see fit for my own account and allow your company two hundred dollars ($200.00) per month from the time I take possession, for the use of the mill.

I will continue this arrangement for a period of nine months subject to the further provisions of this letter and during that time, unless the property is disposed of sooner as hereinafter provided, you will have an opportunity of redeeming the same on payment of all amounts due for principal, interest and charges including any insurance premiums *and improvements*. Credit being given for the monthly rental of the mill as above provided.

The company shall forthwith execute a conveyance of the property to me *to be used in the event of its not redeeming within the time herein provided or* in the event of the property being disposed of sooner to a *bonâ fide* purchaser as hereinafter provided. This conveyance shall in the meantime be deposited in escrow to be delivered to me in either of the events set out above. *Thereupon I will give credit for the amount then due on the mortgage.*

If at any time before the expiration of the nine months an opportunity of selling the property to any third party arises and a *bonâ*

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fide offer is made to me, I agree to give you the option of taking the property over at the same figure as is offered by such third party, you to exercise such option within fifteen days after notice, failing which I shall be at liberty to dispose of the property and the conveyance above referred to shall be delivered to me.

A memorandum will be taken and kept of all logs and lumber and book debts reasonably discounted and in the event of your company paying off the amount due to me and redeeming the property the company shall also pay for any additional amount of logs and lumber and book debts as shewn by such memorandum at the time of the company's taking back the property and business as herein provided, logs and lumber to be taken at the then current market price for logs and lumber.

Nothing in this arrangement is to prejudice my rights as mortgagee in possession, which *are retained intact*, I merely agreeing to suspend exercising my power of sale, etc., in the terms of this letter.

Yours truly,

J. S. EMMERSON.

P.S.—If any suits are instituted against the company I shall be at liberty to register the conveyance forthwith so as to avoid the expense that would be caused by the registration of any judgment and the consequent necessity of foreclosure.

J. S. E.

The company agreed to the terms of the letter, executed the conveyance (exhibit 4) and surrendered possession. The plaintiff having been sued before the expiration of the nine months, defendant registered the conveyance, and now claims that the plaintiff is not entitled to an account, and that he is the absolute owner of the timber limits, and mill site, together with the proceeds derived from the book debts, sale of logs and sawn lumber, as well as office furniture, launches, and other things taken by it and sold although not included in any of the mortgages, nor in any way assigned to the defendant. He further claims that the plaintiff is not entitled to any rental for the mill.

Before the nine months period agreed upon in the letter expired, defendant sold an interest in his account with the plaintiff to two gentlemen, and afterwards in fulfilment of his contract with them, transferred all the plaintiff's property to a company in which he and they were the shareholders.

Defendant did not inform the plaintiff of the sale and transfer, nor give it an opportunity of purchasing the same as provided for in the letter above set out. I merely mention this incidentally as defendant says he still controls the property, etc., and the Court can deal with it as though there had been no sale by him and he was still in possession.

The defendant since taking possession has expended in improvements on the property the sum of $106,000, which, if it is decided plaintiff can redeem, he claims the right to add to his debt as improvements made by a mortgagee in possession, and

also under the provision in the letter (exhibit 5) requiring the plaintiff to pay for "improvements" before redeeming; $30,306.99 of this amount was expended by the 30th June, 1909, the date up to which plaintiff had the right to redeem. During this time the defendant had entire control of all the plaintiff's assets, and after the nine months period expired on the 25th June, 1909, he admitted on the stand, and in his discovery, that he treated them as his own absolute property, gave plaintiff no account of moneys realized from logs, sawn lumber, book debts, etc., etc., he had sold an interest in the account, and his bad faith in general in connection with these improvements is shewn by the fact that he expended over $30,000 before the 30th June, 1909, up to which date plaintiff had the right to redeem. The mill as plaintiff left it was pulled down on or about the 24th May of that year; the $76,000 expended since became necessary by reason of the destruction of the old mill, and the expenditure of the $30,000 shewing clearly that when entering upon the $30,000 expenditure, he contemplated the later and other expenditure of $76,000 without which the mill would be practically useless, but which he could not possibly make until after the period for redemption had expired. He never intended the plaintiff to redeem. He sought to make it impossible, and now wishes to take advantage of the position. I am unable to resist the inference that when he took possession he deliberately set to work to improve the plaintiff out of its property, and make it impossible for it to redeem. The improvements, so called, consisted in building an entirely new mill of an entirely different character, and in the carrying out of his design he removed practically new buildings, a photograph of one of which is shewn in exhibit 15. If he had contemplated any such alterations or improvements he should at least have notified the plaintiff of it, and secured its assent instead of attempting to do it under the terms of his own letter, where the only possible justification is found in the word "improvements" without anything in the context to shew what it meant or referred to. He does not now suggest that he had had any conversation with plaintiff's manager on the subject, while the manager says that it referred to the completion of the minor improvements which he was at the time engaged in carrying out, on the suggestion apparently of one Rodgers, who was supplied by the defendant to assist him in running the business in August, 1908.

Defendant also contends that plaintiff should not be permitted to complain of the improvements since Mr. Wells, its manager, lived in the immediate neighbourhood of the property, and personally saw what was going on, to which plaintiff replies that it did object repeatedly, but the only definite evidence of objection is that of Wells, who says that on or about the 12th December, 1908, he met defendant and referred to the great

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improvements which were foreshadowed in one of the newspapers and objecting to them, saying that if they were made the company would never be able to redeem, and that defendant replied it would only be a few thousand dollars, to which Wells answered, every thousand made it harder. Defendant says he does not recollect any such conversation, but cannot say it did not take place. The newspaper was not put in evidence, but Mr. Taylor, on the argument, admitted that it was dated 12th December, 1908. Mr. Wells admits seeing the improvements going on, and says if he objected any more defendant would have sold under his power in the mortgage. He did nothing more, though he in no way consented. He does not appear to have done any acts from which the Court can infer tacit consent or acquiescence. On this point see the remarks of Jessel, M.R., in *Shepard* v. *Jones*, 21 Ch. D. 469.

On the 24th June, 1909, plaintiff's solicitors, Messrs. Russell & Russell, gave the defendant explicit notice (exhibit 6) that plaintiff repudiated liability for these extensive improvements, cautioned them to desist from further expenditure in that direction, and almost immediately issued the writ herein; but notwithstanding this express notice, and the launching of these proceedings, defendant expended the sum of $76,000, in further improvements, which he insists shall also be added to his debt and refunded to him in case plaintiff is allowed to redeem.

The letter from Russell & Russell notified defendant of the company's intention to redeem, and asked for a full account of his transaction with the company's assets. As the defendant had sold logs and sawn lumber, etc., belonging to defendant, and had also collected some of his book debts, and had made expenditures on improvements, insurance premiums, etc., the repayment of which defendant claimed to be entitled to, it was impossible for plaintiff, without this account, to form any idea of how much money it would have to tender in order to redeem. It could not estimate it within thousands of dollars. The letter states, and Wells also says, that such an account had been asked for before, but it was never at any time furnished. The so-called account of 30th June, 1909, (exhibit 3) does not begin to give the detailed information which plaintiff would require in order to properly ascertain the correctness of the charges made. It charges a number of items apparently without the slightest authority, and charges interest on total indebtedness before giving credit for any portion of the monthly rent. It makes no mention of the new logs or book debts which the plaintiff would also under the arrangement be required to take from the defendant, and pay for, when redeeming. It also charges for superintendence by the defendant of the "improvements:" shews $30,306.99 of such improvements in four lines without any de-

tails whatever. Plaintiff was, I think, entitled to a real account and the single sheet of paper, ultimately furnished on the 30th June, cannot be dignified by that name.

Confident in the inability of plaintiff to raise any money, defendant piled expense on expense in reckless disregard of plaintiff's rights.

The nature of the so-called improvements can be easily imagined from defendant's statement of the business done.

He says that for the first nine months, that is, up to the 30th June, 1909, when the period for redemption expired, the business was carried on at a loss of $622.60, but since then it has made thousands of dollars profit annually. But it is worthy of note that in order to shew the loss of $622.60 he has charged $2,048.81 for insurance, which he never paid and which he had no authority to charge against the plaintiff unless he had actually paid the same; and according to his statement on the witness-stand this amount represented estimated premiums for nine months on the mill and plant which he testified was only worth $5,500 at the time. Of course that valuation was absurd, and in the mortgage of 28th September, 1907, he required plaintiff to covenant to keep it insured for *not less* than $12,000. There was no accident about that for the amount was filled in by his own solicitor. In that statement defendant also makes a "provision for bad and doubtful debts," only ten dollars less than the total salaries paid and charges for supervising log purchases, a sum more than double the total amount paid for salaries.

Plaintiff claims that defendant is a mortgagee in possession, and that as such he must *inter alia* account for all the rents and profits (admittedly many thousands of dollars) made by him since taking possession; and claims further that he is not entitled to be repaid the large sums spent on improvements, and by reason of which the profits were largely made. This suggests to my mind that the plaintiff is just as willing to wrong the defendant as the defendant is to wrong it. So far as the profits are concerned, it seems to me they are fixed by the terms of defendant's letter at $200.00 per month.

Defendant claims that he is entitled to all he has got, logs, sawn lumber, mill, plant, mill site, book debts, etc., etc., on the ground that he is not a mortgagee in possession, but an owner having purchased the plaintiff's equity of redemption by the letter and deed, etc., of the 28th December, 1908.

As the defendant was originally a mortgagee only, the burden of proof is, I think, on him to shew that he has changed that position into one more favourable to himself, on the principle that "once a mortgage always a mortgage."

The notice declares defendant's intention of, at the expiration of ten days, entering into possession—receiving and taking the rents and profits—and of selling.

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The letter asks plaintiff's consent to possession being taken *under the mortgage forthwith*—provides that his rights *as mortgagee in possession shall be retained intact*—and that he merely agrees *to suspend exercising his power of sale*. There is not a word in the letter to suggest that the conveyance referred to is under any circumstances to be used as a transfer to the defendant of plaintiff's beneficial interest in the property in fee and in extinguishment of defendant's claim; it only provides that it is "to be used in the event" of the property not being redeemed, etc., "or in the event of the property being disposed of sooner to a *bonâ fide* purchaser" and on the happening of either such event defendant was to "give credit for the amount then due on the mortgage" (whatever that might in such circumstances mean).

Defendant is not entitled to any more favourable construction of these clauses than the words necessarily imply, and it is not only quite consistent with them, but appears to me to be their natural meaning, that defendant was to sell under his mortgage, if the property was not redeemed, and the conveyance was given in superabundance of caution, perhaps to be produced to any intending purchaser to shew a more complete right and title to sell. But before either of these events happened, defendant registered the conveyance under the authority of the last clause in the letter, which provided that it was to be invoked to avoid expense and the "*necessity* of foreclosure." It must not be forgotten that by the time the period for redemption had expired, it might well have been that defendant would have almost if not entirely extinguished plaintiff's debt out of the proceeds of the timber berth, book debts, sawn lumber, etc. In such case it would be ridiculous to strain the language of the letter into a contract of sale of the equity of redemption in all this property at the expiration of the redemption period. It seems clear that it was intended that there should be a sale by the defendant under the power of sale in the mortgage and none having been made the defendant must still be treated as a mortgagee in possession.

I am not at all impressed with defendant's statements as to values. It seems strange that, experienced millman as he is, he and his witnesses, also experienced men, should have shewn such hesitation in placing a value on the mill site. Mr. Higgins impressed me as a sensible and fair witness, and I think his valuation of $15,000 an acre, *i.e.*, about $70,000 in all, is fairly accurate, and explains defendant's desire to get absolute possession of it.

Mr. Taylor, in support of his contention that plaintiff had no right to redeem, as it had sold its equity of redemption to defendant, cited *Davis* v. *Thomas*, 1 R. & My. 506, and *Bastin* v. *Bidwell*, L.R. 18 Ch. D. 238, but they do not appear to me to

assist him, as the facts in those cases are as dissimilar as possible from those in the present case. In the former, the mortgagor deliberately sold his equity of redemption in consideration of the cancellation of the mortgage debt, and the payment to him of an additional sum, about three months later he obtained a long lease of the property, the mortgagee endorsing an agreement on it that upon rent being promptly paid he should have the right to re-purchase at a slightly increased price. The rent was not promptly paid, and he was unsuccessful in his endeavour to compel the mortgagee to sell. The charges of fraud against the mortgagee entirely failed, as also did the evidence of great difference in value.

In *Bastin* v. *Bidwell*, L.R. 18 Ch. D. 238, 247, there was no question of a mortgage. The plaintiff had taken a lease with a right of renewal "upon paying the rent and performing and observing the covenants," and the Court held that he was not entitled to the renewal as he had not performed the covenants which were a condition precedent to his right, etc.

The case of *Wells* v. *Smith*, 7 Paige 514, also referred to, I am unable to find. It is, I believe, an American report not in our library. [Paige's N.Y. Ch. reports by A. C. Paige, 1828-1845, in 11 vols.]

The conveyance of 28th September, 1908, was not intended as a sale of plaintiff's equity, nor was it in any way given in extinguishment of the plaintiff's mortgage; it is in fact expressly stipulated that it is free from incumbrances, except the very mortgage which it is now claimed is extinguished. It was given for the purposes set out in defendant's letter already referred to. In these circumstances it seems clear to me as already stated that the relation of mortgagor and mortgagee still exists between the plaintiff and defendant, and that the plaintiff is entitled to redeem, and there must be a reference to the registrar to take the necessary accounts.

The only difficulty about the accounts is the nature of the inquiry to be made with reference to the improvements.

In *Carrol* v. *Robertson*, 15 Gr. Ch. (Ont.) 173, a sale by the mortgagee was set aside for irregularity, and the purchaser was allowed for all improvements made by him so far as they enhanced the value of the property, but in that case the purchaser had acted *bonâ fide* and in the belief that he was the absolute owner. But in the present case, there is no question of an innocent third party, we are dealing with the original parties to the mortgage.

The case of *Brotherton* v. *Hetherington*, 23 Gr. Ch. (Ont.) 187, decided by Vice-Chancellor Proudfoot, considerably resembles the case at bar. But in that case it is clear that the intention of the parties was that the property should, from the

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execution of the release of the equity, become the absolute property of the mortgagees, and they were not bound to retain it in the same character in which it previously existed; it was a straight sale with a proviso; there was nothing in the document to restrict the meaning of the word "improvements," and the mortgagees acted *bonâ fide* throughout, while in the present case, defendant has not acted *bonâ fide*. The letter and conveyance must be taken together; they were not intended as a sale, but an extension of time under the mortgage. The letter states on its face that defendant was to "operate the mill" then on the premises—not to build a new one of greatly different character and capacity; and the word "improvements" referred, I think, to ordinary improvements, or at least to such improvements as would be completed and still leave the mill a complete mill capable of being operated at the time the period allowed for redemption expired. I have no doubt that plaintiff thought they referred to improvements of the nature he was carrying out.

Mr. Taylor relied strongly upon *Shepard* v. *Jones* (1882), 21 Ch. D. 469; approved in *Henderson* v. *Astwood*, [1894] App. Cas. 150; but *Shepard* v. *Jones*, 21 Ch. D. 469, was a case of the expenditure of £83 on a mortgage for £2,000, and apart altogether from the question of notice, it was held that the expenditure was reasonable, lasting, and had increased the value of the property; while in the present case the expenditure is over three times the amount of the mortgage, and more than twice the total amount owing to the defendant on all heads, at the time the extension of time was granted. The following remarks of Cotton, L.J., in that case appear to me to be peculiarly applicable to the case at bar. He says, at p. 482:—

> Undoubtedly a mortgagee has no right as against a mortgagor to improve the mortgagor out of his property, and if he lays out a very large sum, that is in itself a thing which he has no right to do. A mortgagor must not be prevented from redeeming by the mortgagee when in possession throwing a great burden upon him.

In *Henderson* v. *Astwood*, [1894] A.C. 150, the action was against the original mortgagee, and the purchaser from him. The purchaser was held entitled to the property as the power of sale was properly exercised; and the mortgagee was held entitled in his account to save extensive improvements, which he had made, but the Court expressly found that there was no fraud or oppression, and the plaintiff admitted (see the remarks of the Chief Justice, at p. 152; and Lord Macnaghten at p. 163) that the money "was reasonably expended in productive improvements," and that they were lasting, necessary and proper, and added to the value of the premises, which I am far from being able to find here. In that case the mortgagee saved the costs of trial because in his defence he submitted to account.

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but he had to pay the costs up to the submission because as pointed out by Lord Macnaghten, at p. 161, it was his *duty to offer them.*

There will be judgment with costs declaring the plaintiff entitled to an account, and there will be a reference to the registrar to take the same as follows:—

1. An account of what is due to defendant under his mortgage, and of the amounts for which the plaintiff is entitled to credit, and in ascertaining such amounts the plaintiff is entitled to credit for the full value of all articles taken by the defendant which were not included in his mortgage.

2. An account of all moneys expended by defendant in necessary or reasonable repairs.

There will be general leave to apply for any further directions which may be necessary, including the question of the costs of taking the accounts after same have been taken.

Reference directed.

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Alberta Supreme Court, Harvey, C.J., Scott, Stuart, Beck and Walsh, JJ. June 22, 1912.

1. EVIDENCE (§ XI R—871)—RELEVANCY AND MATERIALITY—CHARGE OF RAPE—EVIDENCE OF COMMISSION OF SIMILAR OFFENCE.

It cannot be shewn on the trial of a person for rape, that a few minutes after the commission of the offence charged, or at any other time, he committed a similar crime against the person of a sister of the complaining witness, such evidence not being admissible either as part of the *res gestæ*, or to shew a propensity on the part of the accused to commit such crimes.

[*Rex v. Bond*, [1906] 2 K.B. 389, 21 Cox C.C. 252, followed, and *Reg.* v. *Rearden*, 4 F. & F. 76, distinguished.]

2. WITNESSES (§ II B—43)—CROSS-EXAMINATION OF WITNESS—CHARGE OF RAPE—SIMILAR OFFENCE AGAINST WITNESS.

A statement by a female witness on a trial for rape, in response to a question of the counsel for the accused, that she would like to see the prisoner go to prison for life, will not permit the Crown prosecutor to question her as to the commission of a similar offence by the accused against the witness.

3. WITNESSES (§ II B—43)—CROSS-EXAMINATION—CHARGE OF RAPE—VOLUNTARY STATEMENT OF SIMILAR OFFENCE.

A cross-examination by counsel for the accused on a trial for rape as to acts of cruelty committed by the accused against the witness and the complaining witness, to which, in addition to answering the question fully, she volunteered the further reply that the accused was also guilty of a similar offence towards her, will not permit the Crown prosecutor to question her as to the details of such assault.

Statement

CROWN case reserved by SIMMONS, J., on the conviction of the accused upon a charge of committing a rape upon one Matilda Mangelman.

A new trial was ordered.

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Statement

The following were the questions reserved for the opinion of the Court *en banc* sitting as a Court of criminal appeal.

1. Was I right in admitting evidence on the 17th day of May, 1911 (the first day of the trial, when the evidence of the complainant was put in), that Carl Paul had committed similar acts with Nellie May Mangelman?

2. Was I right, on the 18th May (the second day of the trial, when the evidence of the sister was put in), in allowing in evidence that the accused had committed similar acts with Nellie Mangelman?

3. Was I right, on the last day of the trial of the said accused, in allowing the Crown prosecutor to re-examine Nellie May Mangelman as to similar acts committed against her by the accused, on the ground that counsel for the accused had opened the door to such evidence by asking her, the said Nellie May Mangelman, what was or had been the acts of cruelty committed against her and her sister by the said Carl Paul.

H. A. Mackie, for the accused.
L. F. Clarry, for the Crown.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—At the conclusion of the argument the Court was unanimously of opinion that the conviction should be set aside and a new trial ordered, but intimated that the reasons for this conclusion would be given at a later date.

The accused was tried at Edmonton before Mr. Justice Simmons and a jury upon the charge "that he did in or about the month of September, 1909, assault Matilda Susan Mangelman, a woman who was not his wife, and did then and there have carnal knowledge of her without her consent."

The evidence against the accused consisted principally of that of the complainant Matilda Susan Mangelman and that of her sister Nellie May Mangelman. These young girls were living on a farm with their mother, who was a widow, and the accused lived with them and assisted in the operation of the farm, under some arrangement not here material. The alleged assault took place in the harvest-field, while the accused and the two girls were engaged in shocking or stooking grain. After the complainant had given her account of the assault upon her, she was asked the following questions by the Crown prosecutor:—

Q. Did you ever see him do that to any of the other girls? A. No, sir. Only May.

Q. When was that? A. The same day.

This evidence was objected to by counsel for the accused, on the ground that the Crown was not at liberty to put in evidence of similar acts. Thereupon the following discussion took place:—

The Court: It may be evidence as to this girl's knowledge of these things.

Mr. Mackie: Well, I wish to take objection that it is a subsequent act to the act charged, and it cannot be evidence.

Mr. Cogswell: I can prove similar acts, either subsequent or prior.

The Court: Yes.

Mr. Cogswell: Q. What did you see him do to May? A. He did the same thing.

Q. When? A. He went and caught her by the leg and threw her down.

Mr. Mackie: Does your Lordship hold this is evidence?

The Court: Yes.

Mr. Cogswell: Q. Caught her where? A. Caught her by the leg and threw her down, just by her shoe top.

The Court: Threw her down? A. Yes, sir, threw her down.

Mr. Cogswell: Q. What did he do to her? A. He did the same thing.

Q. What did he do? A. I tried to help her, and he wouldn't get off, and then, when I started home, he got off.

Mr. Mackie: I still wish to take my objection, my Lord, as to similar acts not being evidence against this accused. It is likely to injure the minds of the jury.

The Court: Well, it is not necessarily given as evidence of a similar act; it is given as part of this story of what took place there. Now, I have no right, as I view it, to tell this witness to stop at any part of that story, and my view of it is that she is telling what happened at that particular time, and it so happens that there was at that particular time some evidence that might have something to do with a similar offence which I could not exclude; I could not say to her, "Now you must stop there and say no more." Right after she has told what happened to her she said the very next thing was——

Mr. Mackie: That is as far as she can go. All the jury are entitled to hear in this matter is what occurred to Matilda, and not to May.

The Court: Yes.

Mr. Mackie: The only reason for allowing evidence of a similar act would be to shew a motive, but there cannot be any motive as far as rape is concerned. Either he did or did not commit this rape.

The Court: Well, your objection is overruled.

The sister Nellie May, after giving an account of the assault on Matilda and of her attempt to assist her sister, gave the following evidence, which was followed by the discussion quoted:—

After a while I went back again shocking wheat, and Matilda come running to me crying. And then, as soon as they got up, then he went to shocking grain a little while, and then he came over and caught me.

Q. What did he do to you? A. I was shocking wheat——

Mr. Mackie: I take the same objection I took yesterday, that subsequent acts or similar acts can absolutely have no effect on this case as regards proving the charge, and except for the purpose of injuring the character of the accused, and that is an impossibility until such time as the defence puts in evidence of good character on his behalf. Similar acts or any subsequent acts have only one effect, to injure the character of the accused, and I wish to take the same objection I took yesterday to the admission of that evidence.

Mr. Cogswell: There are two or three reasons I want to put this in; one is, it is part of the same transaction.

Mr. Mackie: Same transaction, nothing. It is only one charge.

Mr. Cogswell: But it is part of the same.

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Mr. Mackie: It is not part of the same. He is charged that he did assault Matilda Mangelman, a woman not his wife. He is not charged with assaulting any one else.

The Court: That is true, but in connection with that assault it is necessary to give the history of the whole transaction; and, if it did happen that during, at, or about the time of committing the assault, there happened to be another assault committed, we cannot exclude the evidence of that as long as it is in relation to explaining this transaction or explaining what was going on at that time.

Mr. Mackie: I submit, my Lord, that the evidence is being put in with a view to prejudicing the jury against the accused, by shewing that he is a man of very bad character.

The Court: We cannot help the effect of it.

Q. I wish you would go back—I do not just understand the sequence of these events—to the time that you said that you were kicking and your sister was pulling his hair. What happened next? A. Why, then I went back again and went to shocking wheat.

Q. You told us that he was lying down on your sister and she was pulling his hair and you were kicking him? A. Trying to make him get up.

Q. There surely was something else happened before that? You went back to shocking wheat? A. Yes, sir.

Q. And then what next? A. And then he got up.

Q. And where were you when he got up? A. I was back shocking wheat again.

Mr. Cogswell: Q. What then occurred? A. I was shocking wheat and then when——

Q. And then what?

The Court: Q. What was Matilda doing then? A. Matilda was pulling his hair and trying to make him get up.

Q. Still while you were shocking wheat? A. Yes, sir, and then after a while he got up.

Q. She was still pulling his hair, you say, and trying to get up, is that right? A. Yes, sir.

Q. Yes? A. Then I went back shocking wheat, and a wheat shock fell over and I fell over too, so he came running and got on me.

Q. You fell over the wheat shock? A. Yes, sir, and then he come and got on me.

Q. Well, we will stop there then. You fell down over a wheat shock, did you? A. Yes, sir. A wheat shock tipped over.

Q. Where was he then? A. He was up shocking wheat too.

Mr. Cogswell: Q. How far away was he from you when you fell over? A. Not very far.

Q. And what did he do? A. As soon as I fell down he saw me lying there, and then he come and run over and got on me.

Q. And what did he do to you?

Mr. Mackie: The same objection that was taken a moment ago. A. He had connection with me.

Mr. Cogswell: Q. What did he do? Just say what he did?

The Court: I think we will not go into this any further. It seems to be the end of the first transaction, as far as I can learn from her story.

Mr. Cogswell: I think, my lord, it might be admissible, on the ground of shewing his propensities, habits.

The Court: I do not think it is necessary to go on with this. I wanted to get the story of what took place with regard to Matilda, and I think she has apparently got to the end of that.

Mr. Cogswell: I would like to ask her, my Lord, if this was the first time he had connection with her. (Objected to. Objection sustained.)

And again she said in cross-examination:—

Q. Yes? How long would it be after the accused got off your sister that you went home? A. Well, it is this way, as soon as he got off my sister he went to shocking wheat but a minute, and I was shocking wheat, and a wheat shock fell over, and I just stood up there, and the wheat shock fell over and I fell on top, and so he came running and got on top of me.

Q. I am not asking you that. I am asking you how long it would be from the time that Matilda got up—— A. About ten minutes.

Upon further cross-examination by counsel for the accused the following took place:—

Q. Am I wrong in saying that you told me you would be pleased to see the accused go down for life? Did you say that or do you say it now? A. I didn't say it.

Q. Well, do you say it now? A. Yes, sir.

Q. Yes. You would also be pleased to see him go down for life. Carl Paul was never cruel to you or any of the other girls, was he? A. Yes. He was.

Q. He used to whip you once in a while? A. He nearly whipped us every day.

Q. Did he ever cause you any bodily harm? Did he ever cut you up, beat you so the blood would come? A. One time he whipped me till I was black and blue in my face, with a broom handle.

Q. How long ago was that? A. It was last year, when we just got a little while through threshing.

Q. Your mother and Paul got along very well, didn't they? A. No, sir.

Q. They were not very happy, were they? A. He would whip mamma and call her all kinds of names.

Then upon re-examination by counsel for the Crown, the following took place:—

Mr. Cogswell: I think, my Lord, in view of the cross-examination, that I might ask her if Carl Paul did anything before to her?

The Court: Yes, I stopped you in that, but counsel for the defence has asked her.

Mr. Mackie: You will notice the witness repeatedly volunteered those statements and I could not stop her. It was purely as to acts of cruelty, his treatment of her.

The Court: You have opened the door, and Mr. Cogswell can go into that question. It is the treatment of her.

Mr. Cogswell: Q. Nellie, you stated he did something wrong to you in the wheat-field? A. Yes, sir.

Q. Did he ever do anything wrong to you before that? A. Yes, sir.

Q. Do you remember when? A. It was Christmas Eve.

Q. When? A. On Christmas night.

Q. What Christmas night? A. 1909.

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Q. Was it before or after this? A. Before.

Q. And what did he do to you on that occasion? A. What did he do?

Q. Yes? A. Well, he had connection with me.

The questions submitted by the learned Judge for our opinion were:—

1. Was I right in admitting evidence on the 17th day of May, 1911 (the first day of the trial, when the evidence of the complainant was put in), that Carl Paul had committed similar acts with Nellie May Mangelman?

2. Was I right, on the 18th May (the second day of the trial, when the evidence of the sister was put in), in allowing in evidence that the accused had committed similar acts with Nellie Mangelman?

3. Was I right, on the last day of the trial of the said accused, in allowing the Crown prosecutor to re-examine Nellie May Mangelman as to similar acts committed against her by the accused, on the ground that counsel for the accused had opened the door to such evidence by asking her, the said Nellie May Mangelman, what was or had been the acts of cruelty committed against her and her sister by the said Carl Paul?

4. On the above grounds or any of them should there be a new trial?

I can see no distinction between the first two questions. If the story of the subsequent assault on the same day of the second sister could be told by one witness, it could be told by the other.

The simple question is, whether, upon an indictment for rape upon one woman, evidence can be put in of a rape committed upon another woman, some few minutes after the rape charged in the indictment was committed, when the two women and the accused happened to be working in a field together, and the second woman had made an attempt to assist and defend the first.

I am unable to discover any ground upon which such evidence was properly admissible. It was suggested that, inasmuch as the second assault occurred so soon after the first, it should be treated as part of the *res gestæ;* and this seems to have been the ground on which the trial Judge proceeded. There would, no doubt, be a great deal in this suggestion if the second assault had been upon the same woman within so short a time; but the evidence does disclose the fact that after the first assault the accused went to work for a little while, a very short while, it is true, before he proceeded to assault the other woman. I confess, I cannot understand how the second assault can be considered as part of the *res gestæ* of the first. Owing to the particular nature of the offence alleged, this seems quite contrary to actual reason.

In *Rex* v. *Bond*, [1906] 2 K.B. 389, 21 Cox C.C. 252, at p. 255, Lord Alverstone said:—

> The general rule of law applicable in such cases can, I think, be clearly stated. It is that, apart from express statutory enactment, evidence tending to shew that the accused had been guilty of criminal acts other than those covered by the indictment cannot be given, unless the acts sought to be proved are so connected with the offence charged

as to form part of the evidence upon which it is proved (see *Reg.* v. *Rearden*, 4 F. & F. 76), or if they are material to the question whether the acts alleged to constitute the crime were designed or accidental (*Reg.* v. *Gray*, 4 F. & F. 1102), or to rebut a defence which would otherwise be open to the accused (see *Makin* v. *Attorney-General of New South Wales*, [1894] A.C. 57, 17 Cox C.C. 74).

As Lord Alverstone points out, the difficulty lies in applying these principles to the particular case; but it must be obvious here that the alleged second assault upon a second girl, some minutes after the assault charged, could not by any possibility be said to be so connected with the first assault as to "form part of the evidence upon which the latter was proved."

It was exceedingly easy to tell the story of the first assault without the second being necessarily dragged in. The witnesses were led to tell of the second assault, not by any difficulty in avoiding it while telling the story of the first, but by the direct questions of the counsel for the Crown.

It is true that in *Reg.* v. *Rearden*, 4 F. & F. 76, Willes, J., admitted evidence of repeated assaults upon the same little girl on different days. But the decision seems to rest quite obviously upon the ground that the acts were upon the same girl. The Judge says:—

> The rules of pleading in civil and criminal cases are the same. And on separate counts in either a civil or criminal case you could prove different batteries or woundings on the same person, and so as to acts of rape. . . . It has repeatedly appeared to me in cases of this sort that the man by a threat of violence deters the child from complaining, and thus acquires a species of influence over her by terror, which enables him to repeat the offence on subsequent occasions, and this seems to me to give a continuity to the transaction, which makes such evidence properly admissible.

It seems to me that the line should be strictly drawn between a repetition of the act upon the same girl who is the complainant and assault upon another female. Where it was not necessary to tell the one story owing to its being so mixed up with the other as to be inseparable, it seems to me the only test to be applied is: has the fact of his having done the second act any logical probative force as tending to prove the commission of the first? Put in this way, it seems to me the answer must be "No"—unless, indeed, it were open to the Crown, as the Crown counsel suggested at the trial, to shew the existence of strong sexual passion and weak powers of control in a man in order to shew that he would be the more likely to commit rape. This is really, it appears to me, the logical result to which the argument would lead.

It seems to me that, in dealing with the question of the admissibility of evidence of similar acts, a great deal depends upon the nature of the crime alleged. A rule which may be applied to theft (*Reg.* v. *Collyns* (1898), 4 Can. Cr. Cas. 572), or arson (as in *R.* v. *Long*, 6 C. & P. 179), will not necessarily apply to such a crime as

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rape. And even with respect to crimes of indecency one rule may very well apply to cases where consent is immaterial, such as *Rex* v. *Chitson*, [1909] 2 K.B. 945, and another to a case where absence of consent is essential.

In *Rex* v. *Chitson*, [1909] 2 K.B. 945, it is apparent that the reason for the admission of the prisoner's statement to the complainant that he had done the same to another girl, was, as stated by Lawrance, J., that, "if he has made that statement to the prosecutrix as to the time alleged by her, that fact would strongly corroborate her evidence that the prisoner was the person who had had connection with her."

It cannot be suggested that either of the other two grounds mentioned by Lord Alverstone in *Rex* v. *Bond*, [1906] 2 K.B. 389, 21 Cox C.C. 252, are applicable in this case. There can be no question of possible accident in a case of rape, nor is there any other defence conceivable which evidence of the second assault could possibly rebut. I do not think the suggestion made by Mr. Clarry upon this point can be entertained for a moment as having any logical basis. The case of incest which arose in *Rex* v. *Ball*, [1911] A.C. 47, 75 J.P. 180, 22 Cox C.C. 366, 80 L.J.K.B. 691, rested upon special circumstances applicable to such a crime. The evidence of previous similar acts there admitted was considered relevant as tending to prove the existence of a guilty passion between the brother and sister, *i.e.*, the existence of a guilty relationship between the two, which would tend to prove the commission of the act of incest charged. This, I think, furnishes a ground for distinguishing incest from rape in dealing with the point under consideration.

These reasons are sufficient, in my opinion, for deciding, not only that the evidence of the second assault on the same day was inadmissible, but also for rejecting the evidence of the assault on Nellie May some nine months before. It is obvious, I think, that the witness intended to say that the previous assault was at Christmas, 1908, and not 1909, as appears on the record. The only other reasons alleged for admitting the evidence as to this previous assault was that counsel for the defence had "opened the door" for it by his cross-examination.

I am unable to discover anything in the cross-examination which justified counsel for the Crown in re-examination in adducing this evidence.

It is true that counsel for the defence had induced the witness to say that she would like to see the accused sent to a penitentiary for life; but, in the first place, there was quite sufficient reason already shewn for her entertaining such feelings towards the accused. She had seen him, so she said, make a brutal assault upon the chastity of her sister. If her confession that she would like to see him go to gaol for life indicated animosity towards him, surely that animosity was sufficiently excusable, even on grounds already shewn.

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In the next place, if the Crown desired to explain the reason for such animosity on re-examination, it was sufficient and proper to ask the direct question, "Why did you say you would like to see him sent to gaol for life?" And it is possible that any answer she may have given to that question, even if it contained the allegation of a previous felony, unconnected with the crime charged, would have been quite admissible.

But what happened here was that counsel for the Crown, instead of asking that question, proceeded directly to question the witness about other acts of assault, and the jury was left to infer that these furnished a reason for the animosity of the witness, though the witness herself did not advance them as a reason therefor.

It is, of course, difficult here to draw the line, but, if it was admissible to ask the question as the Crown did, I can see no reason why the witness ought not to have been asked about a theft from her of some of her property or something of that kind.

I think the Crown should have been content to ask the witness to give her reason for the animosity and to let her give whatever reason she pleased. Anything more than that was, I think, in the circumstances, inadmissible.

New trial ordered.

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Alberta Supreme Court. Trial before Simmons, J. February 15, 1912.

1. STAY OF PROCEEDINGS (§ II—21)—EFFECT OF DECISION ON POINT OF LAW RAISED IN PLEADINGS PENDING AN APPEAL.

Where a party raises by his pleading a point of law to be decided at a hearing before the trial, the Court will not, as a rule, stay the trial of the issues of fact, pending an appeal from the decision upon the point of law.

[*Re J. B. Palmer*, 22 Ch. D. 88, referred to.]

2. TRIAL (§ I D—16)—RIGHT TO BEGIN—RAISING A POINT OF LAW BY PLEADINGS.

The party who obtains a preliminary hearing of a point of law has the right to begin, and, for the purposes of the argument, he is taken to admit all the facts in the opposite pleading, and the Court will take the whole record into consideration and give judgment to the party who, on the whole, appears entitled to it.

[*Stevens* v. *Chown*, [1901] 1 Ch. 894, and *Burrows* v. *Rhodes*, [1899] 1 Q.B. 816, referred to. See also Odgers on Pleading, 7th ed., p. 169.]

3. EVIDENCE (§ II K 1—311) — PRESUMPTION — CONSIDERATION — AGREEMENT PURPORTING TO BE A PROMISSORY NOTE.

In an action upon a document purporting to be a promissory note, but which is in fact not a promissory note but an agreement in writing, consideration will not be presumed in favour of the plaintiff.

4. BILLS AND NOTES (§ I B—8)—VALIDITY—PREMIUM NOTE SIGNED BY INTOXICATED PERSON—AMENDED APPLICATION—RATIFICATION — ESTOPPEL.

One, who, when so drunk as to be incapable of knowing what he is doing, signs an application for life insurance on his children and a note

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for the premium thereon, and subsequently, when sober enough to know the nature of his actions, signs an amended application, and knows that the children are being medically examined for insurance, and, when informed by his wife that the policies had been sent to the house, makes no objection, and does nothing until payment of the premium note is demanded, will be deemed to have ratified his action when drunk, and will be estopped from raising the defence of incapacity in an action on the premium note, and from saying that there is no contract of insurance upon which he is liable, but he will not necessarily be held to have ratified everything contained in the original application.

5. INSURANCE (§ III A—41)—POLICY—APPLICATION SIGNED BY INTOXICATED PERSON—MATERIAL MISREPRESENTATION—ABSENCE OF RATIFICATION—FRAUD OF AGENT.

Where one who is incapacitated by drink from knowing what he is doing signs an application for life insurance, filled in by the agent of the insurance company, which contains a material misrepresentation, and also a provision that, in the event of any such material misrepresentation in the application, the policy shall be void, and the untrue statement is never brought to the knowledge of, or ratified by the applicant, the application is a fraud by the agent upon both the insurance company and the applicant, and there is no valid contract of insurance.

Statement

ACTION for premium notes given on an application for a life insurance policy.

Judgment was given for plaintiff for part of claim, with set-off to defendant on account of action having been brought in the Supreme Court.

J. W. McDonald, for the plaintiffs.

J. C. Brokovski, for the defendant.

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SIMMONS, J.:—The plaintiffs sue the defendant on two promissory notes for $446.50 dated the 7th May, 1908, and $549.50 dated the 15th May, 1908, respectively, and bearing interest at 6 per cent. per annum, and maturing on the 15th November, 1908.

The defendant pleads denial as maker, and, in the alternative, says that, if he did give the plaintiffs these notes as alleged in the claim of the plaintiffs, he was under the influence of liquor and incapable of contracting when the same were given, and that the notes were given on account of a premium on an insurance policy on the lives of the defendant and his children and unenforceable on account of the defendant's incapacity at the time of making the notes. The plaintiffs, in reply, deny the incapacity of the defendant when the notes were given, and plead subsequent ratification by the defendant of his acts in giving the plaintiffs the notes in question.

The notes in question are as follows:—

This note must be paid in full at maturity—a renewal hereof will not be entertained.

Amount	$446 50	Due 15th November, B. O. No. 538, H. O.
Interest	10 00	No. 708.
Total	$456 50	

Claresholm, May 7th, 1908.

On the 15th day of November, 1908, without addition thereto of days of grace, I promise to pay to The Imperial Life Assurance Company of Canada, or order, at its head office, Toronto, Ontario, the sum of four hundred forty-six and 50/100 dollars with interest at 6 per cent. per annum as well after as before maturity.

This note is given to the said company in connection with a premium on a certain policy of life insurance. It is hereby agreed, in accordance with a provision of the agreement subscribed to in the application for the said policy and set forth in the said policy, that, if this note is not paid on or before its due date, the said policy will thereupon cease to be in force and will be revived only upon compliance with all the provisions of the said policy relating to its revival. It is hereby further agreed that the liability to pay this note shall continue notwithstanding the lapse of the said policy.

Louis Audett

.....

.....

Exact post office address.

The interest clause in this note must not be erased.

This note must be paid in full maturity—a renewal hereof will not be entertained.

Amount $549 50 Due 15th Nov., B. O. No. 551, H. O. No.
Interest 10 95

Total $560 45

Claresholm, Alta., May 13th, 1908.

On the 15th day of November, 1908, without addition thereto of days of grace, I promise to pay to The Imperial Life Assurance Company of Canada, or order, at its head office in Toronto, Ontario, the sum of five hundred forty-nine 50/100 dollars with interest at 6 per cent. per annum as well after as before maturity.

This note is given to the said company in connection with a premium on a certain policy of insurance. It is hereby agreed, in accordance with a provision of the agreement subscribed to in the application for the said policy and set forth in the said policy, that, if this note is not paid on or before its due date, the said policy will thereupon cease to be in force and will be revived only upon compliance with all the provisions of the said policy relating to its revival. It is hereby further agreed that the liability to pay this note shall continue notwithstanding the lapse of the said policy.

Louis Audett

.....

.....

Exact post office address.

The interest clause in this note must not be erased.

The notes have the following indorsements on the back thereof:—

The Imperial Life Ass. Co.
of Canada.

To whom it may concern:

Policy No. 22,297—23,305—22,306—22,307 issued by this company is not now in force and will not be revived by the payment of this note

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until all the provisions of the said policy respecting revival have been complied with.

Signed this 30th day of Dec., 1908, at Toronto.

T. Bradshaw,
Managing Director.

The Imperial Life Ass. Co.
of Canada.

To whom it may concern:

Policy No. 22,298 issued by this company is not now in force and will not be revived by the payment of this note until all the provisions of the said policy respecting revival have been complied with.

Signed this 30th day of Dec., 1908, at Toronto.

T. Bradshaw,
Managing Director.

Counsel for the plaintiffs put in questions and answers 93 and 94 of the examination of the defendant on discovery, which are as follows:—

(93) Q. But you did not know anything about the policies? A. Yes, I had them in the house. The woman shewed them to me.

(94) Q. How do you know you gave the notes for the policies? A. I must have.

The defendant admitted that the above notes were the ones referred to in the above questions and answers, and admitted his signature as maker on the same; and the notes were made exhibits.

Counsel for the plaintiff then rested his case. Counsel for the defendant then moved for a dismissal of the plaintiffs' action, on the ground that the alleged notes were not promissory notes, but agreements in writing, which did not come within the definition of a promissory note, as defined by the Bills of Exchange Act, and that the plaintiffs were, therefore, bound to prove consideration, which they had failed to do.

For the plaintiffs it was contended that the instruments were promissory notes, and, in the alternative, if they were contracts in writing, not coming within the definition of promissory notes, the plaintiffs relied on Order XIX, Rule 20, of the English Rules:—

> When a contract, promise, or agreement is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract, promise, or agreement alleged, or of matters of fact from which the same may be implied by law, and not as denial of the legality or sufficiency in law of such contract, promise, or agreement, whether with reference to the Statute of Frauds or otherwise.

The application of the defendant for a dismissal of the plaintiffs' action raises a question of law, namely, the proper interpretation of a document in writing executed by the defendant. Is the document a promissory note, or is it an agreement in writing

which puts upon the plaintiffs the duty of alleging in their pleadings consideration, and proving the consideration as part of their case? Under Order XXV., Rule 2:—

> Any party may raise by his pleadings any point of law, and the same shall be disposed of by the Judge who tries the cause at or after the trial, provided that, by consent of the parties or by order of the Court or a Judge, on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.

This Rule should be read with Rule 3 of the same Order, which is as follows:—

> If, in the opinion of the Court or Judge, the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set-off, counterclaim, or reply thereto, the Court may thereupon dismiss the action or make such order therein as may be just.

As a rule, the Court will not stay the trial of the issues of fact after the decision of the questions of law pending an appeal from the latter decision: *In re J. B. Palmer*, 22 Ch.D. 88.

Demurrers were abolished by Rule 1 of Order XXV.; and Rule 2 of the same Order preserved the right of raising objections on points of law. The party who raises a point of law by his pleadings has the right to begin: *Stevens* v. *Chown*, [1901] 1 Ch. 894, and, for the purposes of the argument, he is taken to admit all the facts alleged in the opposite pleading: *Burrows* v. *Rhodes*, [1899] 1 Q.B. 816; and the Court will take the whole record into consideration and give judgment to the party who on the whole appears entitled to it: Odgers on Pleading, 6th ed., p. 165 [7th ed., p. 169].

The defendant did not by his pleadings raise the point of law as to the interpretation of the written document. It appears, however, that he was not bound to do so, but at the trial he might urge any point of law he liked, whether raised in the pleadings or not: see Odgers on Pleading, 6th ed., 165 [7th ed., p. 169].

In discussing the application of Rule 2 of Order XXV., Odgers on Pleading, 6th ed., p. 170 [7th ed., p. 174], says:—

> Where the matter is one of first impression, or where for any other reason the law on the point is not clear, it may be very desirable to argue an objection and settle the point of law before incurring the expense of a trial with witnesses. But in ordinary cases it is generally wiser to raise the objection on the pleadings, but not to apply to have it argued before trial. The usual result of such an argument is, that, if the defendant succeeds, the plaintiff obtains leave, on paying the costs of the argument, to amend his statement of claim . . . Hence, as a rule, it is best not to apply to have any points argued before trial, unless the objection is one that will dispose of the whole action, and which cannot be removed by any amendment which the plaintiff can truthfully make.

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It is quite clear that if, at the end of the argument on the question of law raised by the defendant's counsel, it had been decided adversely to the plaintiffs, it would not substantially dispose of the whole action or of any distinct cause of action. Even if not in form a promissory note, the agreement would entitle the plaintiffs to found an action against the defendant. Consideration would not be presumed in their favour, however.

Having reserved the point raised and having heard all the evidence, I think that it is quite apparent that the defence raised by the defendant, namely, incapacity to contract at the time the writing was executed by him, goes to the whole merits of the case. The defendant made out a *primâ facie* case and put upon the plaintiffs the onus of meeting the defence of incapacity to contract, and the consequent result of a declaration that the defendant would not be liable. It does not, therefore, seem to be necessary now to decide whether the instrument was a promissory note or an agreement in writing which did not come within the definition of a promissory note.

A large number of witnesses were present at the trial, some having come a considerable distance, and it seemed to me in the interests of justice, therefore, to deal with the issues which were disclosed by the evidence as if the pleadings had been made, by way of amendment or otherwise, sufficient properly to raise them.

The defendant is a farmer, who, in the spring of 1908, resided near Claresholm, in the province of Alberta; and, about the 8th May, two agents of the Imperial Life Assurance Company, named Ughland and Stewart, visited him on his farm. The defendant had two farms, one called the "Section" and the other the "Homestead," and the first visit by Ughland and Stewart was at the "Section." The defendant says he told Ughland that he could not pass an examination, and that he had been rejected in Oregon. The defendant further says that Ughland "passed the booze," and they began drinking, and that they emptied the bottle, and Ughland refilled it from a two-gallon jug Ughland had, and he (the defendant) remembers nothing more. In a day or two afterwards, Dr. Learn, Dr. Walwin, and Stewart visited him at the "Section" and made a medical examination in connection with an application for insurance on the defendant's life. About a week after this, Ughland and Stewart visited him at the "Homestead." The defendant says they passed the bottle. The defendant said he did not want any insurance for his children, when they proposed that he should insure the children. Ughland passed the bottle and said, "Have a drink anyway," and they emptied the bottle. Ughland and Stewart asked who was working in the field and the defendant told them Maxwell and Tole were in the field, and Ughland and Stewart went out to the

field to solicit insurance from them, and the defendant says he remembers nothing further that day. The defendant says he has no recollection of signing any application for insurance or note or other document on either occasion.

When Drs. Learn and Walwin and Stewart came out to the "Section" to examine him, the defendant says: "Stewart got out of the rig first and gave me the wink and produced a bottle of whiskey, which he and one Maxwell drank at the barn while the doctors went into the house." The defendant says that Stewart told him that the doctors had come to examine him, and he said it was no use, as he had been rejected before. He says he went into the house, and he does not know what took place there. Maxwell says that, when the two doctors came with Stewart to examine the defendant at the "Section," he had a drink with Audett, and the latter was a little the worse for whiskey, and afterwards Ughland and Stewart come to where he (Maxwell) was ploughing on the defendant's homestead, and they had liquor and gave him drinks, and he had a number of drinks with Stewart in the field and at the barn.

Frank McCallum, a neighbour, was at the "Homestead" when Stewart and the two doctors came, and he says Audett was intoxicated and had been so for two weeks. He says he was present when the doctors examined Audett, and the latter was pretty well on in liquor. He heard the doctors ask Audett questions about his relations, his drinking habits, etc., saw them examine his heart and pulse. Stonewall J. Foles, who was ploughing with Maxwell when Ughland and Stewart visited them at the "Homestead," said they had all kinds of booze, and solicited him and Maxwell for life insurance in the Imperial Life, and he had several drinks from them, and more drinks at the barn when they went to dinner. A few days later, he says, Dr. Learn and Stewart came to examine them, and Stewart had a bottle, and he and Maxwell received drinks from Stewart.

This witness says that Dr. Learn said to Audett: "Do you remember the time I went to awaken you up in the barn at Claresholm? Are you drinking as heavy as then?" And Audett answered: "I drink plenty of booze—do that all the time." Dr. Learn replied: "You were dead to the world when I tried to waken you up. Do you remember that?"

This was apparently the visit to the homestead when the children were examined by Dr. Learn. Dr. Learn, a witness for the plaintiffs, denied making the above statements. He also says that Audett was sober then, but he might have had a drink.

Dr. Learn did not impress me as a very candid witness, and was not able to give very much detail of what occurred at each of his visits further than what appeared on the medical report. These reports are manifestly incorrect in important matters, as

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in the children's urine tests. I am quite convinced that he never took any samples of the children's urine, and his report is a fraudulent one in that regard. I can attach no credit to his evidence when it is not corroborated by a credible witness.

Dr. Walwin seemed to be a much more candid witness. He says he thinks Audett was capable of transacting business when he examined him, and that Audett admitted he would go to town once or twice a month and have a drink. The plaintiffs were not satisfied with the statements of this witness as to the defendant's weight and use of intoxicating liquor, and wrote him as follows:—

May 18th, 1908.

W. E. Walwin, Esq., M.D.,
Claresholm, Alta.

Dear Doctor,—

Re Examination Louis Audett.

We beg to acknowledge receipt of the above examination. The applicant is 45 pounds overweight, yet you rate him as a first-class risk, with no explanation as to what the extra weight is due. A doubt has arisen in the mind of our chief medical referee as to the exact amount of alcohol stimulants which the applicant uses. Will you be good enough to obtain whatever explanation is available on this last point, and also explain the extra weight and oblige.

Yours truly,

.....
Managing Director.

F.S.P./M.E.B.

And, as a result of the receipt of this letter, the witness called Audett in off the street and re-examined him. I do not think that Dr. Walwin remembered very distinctly what took place at the house further than what the medical report and correspondence disclosed, but I cannot help concluding that, at the time of the medical examination by the two doctors, Audett had been supplied with liquor by Stewart, and that he was partly intoxicated, but was not sufficiently intoxicated to be unable to realize that he was being examined in connection with an application to the plaintiff company in regard to an insurance policy on his life, and that he answered questions asked by the doctors as to his family history and other matters.

I am not able to conclude that he was asked or answered all the questions appearing on the reports of Dr. Walwin and Dr. Learn. The examination was made in a room where there were a number of people—members of the defendant's family and help and neighbours—and conducted in a very desultory way, although the form used by the examiners specifically directs that no third person shall be present during the examination.

I am not able to conclude that Audett was asked the questions purported to be asked by the medical men in regard to prior application for insurance and in regard to intoxicating liquor.

or that he gave the answers purporting to be made by him in this regard. Audett's wife says that one of the doctors asked him if he was an habitual drunkard, and Audett answered that he used liquor freely at times. As to the applications for insurance, which the defendant now admits were signed by him, he says he has no recollection of signing them, and, if he did, he must have been drunk and did not know of it. He says the same in regard to the notes. He admits that he signed the amended applications on the children when in town, but he was drinking then with Ughland, and he did not read the documents and did not know what they were. The plaintiffs have not called Ughland or Stewart, and I accept the defendant's statement, which is uncontradicted, that he was drunk and incapable when he signed the applications for insurance on himself and his children.

It is quite evident that Ughland and Stewart came to the defendant's place with a considerable supply of liquor and furnished liquor in considerable quantities to the defendant and two other men who were working for the defendant then, and solicited and obtained applications from the workmen, as well as from the defendant.

If the defendant has not by his subsequent acts ratified what he did in signing the applications and notes when drunk and incapable, he is entitled to the relief he asks for. In regard to the applications on the children, I find that he did so ratify as to make him liable. He signed amended applications as to the children's insurance, and he must have known that they were examined by Dr. Learn for the purpose of insurance. He was informed by his wife when the policies came to the house, and stood by and took no objection. In fact he did nothing until payment was demanded, and I think he has done such subsequent acts as estop him from relying on the defence of incapacity to contract when the applications were taken and the note signed. The amount of the note sued upon for these premiums is $549.50 and interest. The indorsement on the back of the note is: "To whom it may concern" that the policies for which this note was given as payment for premiums were no longer in force from the 30th December, 1908. The policies are dated the 1st June, 1908, and, according to the declaration on the note, were only in force for seven months, and the insured only had the benefit of seven months' insurance. The liability of the defendant, then, is only for that period, and the proportionate amount of the yearly premiums, aggregating $549.50, is $320.54 and interest for seven months at six per cent. per annum. It is true that the applications say "that, in consideration of the expense incurred in connection with this application, I shall accept the said policy when issued and pay the first premium thereof."

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I have found as a fact that the defendant was incapacitated when he signed the declaration above referred to and contained in the application, and the acts of ratification which I have found against him do not go so far as to hold him for all that was contained in this document, but only to this extent, that he did such acts as were sufficient to warrant the conclusion that he knew negotiations were being carried on, medical examinations made, applications amended, and policies issued, and took no steps to disavow or disclaim his liability for the same; and he is therefore, estopped from saying that there was no contract of insurance for which he was liable.

The beneficiaries under these policies received benefit to the extent of seven months' insurance, and this is the extent of the consideration given by the insurance company; and the compensation is, accordingly, that proportion of the year's premiums.

As to the note for $446.50, I have to take different ground and find that there was no contract for insurance between the defendant and the company upon the life of the defendant. The application contains a statement which is admittedly untrue. I refer to the question and answer:—

> (a) Has any company or society ever declined to assure your life or offered you a policy different from that for which you applied? Ans. No.

And the clause (3) of the application:—

> That, if any evasion, concealment, or misrepresentation, material to the risk, has been or shall be made in the answers and statements contained in parts 1 and 2 of my application, the said policy shall be void.

The effect of such an untrue statement in an application for insurance is very fully established in *Biggar* v. *Rock Life Assurance Co.*, [1902] 1 K.B. 516. In that case the application was filled out by the agent of the company, and many of the answers were false in material respects. The false answers were inserted without the knowledge and authority of the applicant, who signed the application without reading it. It was held that it was the duty of the applicant to read the answers before signing them, and, having signed them, he was held to have adopted them, and that in filling in the untrue answers the agent was the agent of the applicant and not of the company.

The decision of the Supreme Court of United States in *New York Life Insurance Co.* v. *Fletcher*, 117 U.S. 517, is quoted with approval on the same point in this decision of the King's Bench Division.

Now, what happened in the present case is, that a policy issued on the life of Audett, which, as against the company, was absolutely void on account of this untrue statement; and, if he had died, his beneficiary could not have recovered against the company.

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It does not seem necessary to discuss what the rights of the company might have been against the insured if they elected to waive this defect and enforce the contract as only voidable at their option. Those circumstances could only have applied if Audett had, perhaps innocently, like Biggar, signed an untrue statement upon which the company relied as forming a basis of the contract, with his eyes open and his mind capable. I found as a fact that he did not do so, and there is no evidence that the untrue statement purporting to be made by him in the application was ever brought to his knowledge; and, therefore, he could not ratify it. It was a fraud of the agents Ughland and Stewart upon both the company and the applicant, apparently in order to secure a commission to themselves; and the alleged contract entirely fails on this ground.

Simmons, J.

There will, therefore, be judgment for the plaintiffs for the sum of $320.54 and interest and costs on the lower scale. The defendant will have a set-off of costs on account of the action having been brought in the Supreme Court under the higher scale of costs.

Judgment for plaintiff for part of claim.

COCKSHUTT PLOW CO. v. MACDONALD.

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Alberta Supreme Court. Trial before Simmons, J. February 12, 1912.

1. MASTER AND SERVANT (§ IV—313)—LIABILITY OF INDEPENDENT CONTRACTOR FOR NEGLIGENCE—FALLING OF WALL OF BUILDING.

One who employs a contractor to erect a building is not answerable for damages sustained by an adjoining property owner through the falling of a wall as the result of the negligence of the contractor in building it, the maxim, *qui facit per alium facit per se*, not being applicable.

[*Reedie* v. *London and North Western R. Co.*, 4 Ex. 244, and *Gayford* v. *Nicholls*, 9 Ex. 702, followed; Beven on Negligence, 3rd edition, ch. 3, specially referred to.]

Statement

THIS is an action brought to recover $188.30, being the amount of a promissory note made by the defendant in favour of the plaintiff. The defendant counterclaimed for damages occasioned to him by the fall of a wall of a building being erected on the land of the plaintiff adjoining the defendant's premises. The building was being erected by a firm of competent contractors under the supervision of an architect.

Judgment was given for the plaintiff for the amount of the note and the defendant's counterclaim was dismissed with costs.

J. B. Roberts, for the plaintiffs.

E. F. Ryan, for the defendant.

Simmons, J.

SIMMONS, J.:—The defendant proved conclusively that he was prevented from carrying on his business for about ten days

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after the accident while the débris and broken wall were being removed from the premises occupied by him; also, that his trade fell off as a consequence of the interruption; and that the accident thereby occasioned a considerable loss to him. The plaintiffs say that they are not responsible for the damage occasioned to the defendant through the fall of the wall of the plaintiffs' building.

The evidence shews that the plaintiffs employed a reliable firm of contractors, the Alberta Building Company Limited, to construct a brick warehouse on their premises, according to plans prepared by a firm of architects in Winnipeg, and the building was constructed under the supervision of Mr. Lawson, an architect in Calgary. The construction began in the summer of 1906, and the contract called for completion on the 15th January, 1907.

The building was not completed at this date, and construction of the wall was carried on when the temperature was about 30 degrees below zero. On the 12th June, 1907, the east wall fell, and the cause was found to be defective construction.

John T. Bawden, a witness for the defence, who cleared away the fallen material and helped to reconstruct the wall, says that the accident was due to construction in cold weather and defective material—there was air-slaked lime which had slaked in the wall. He found frozen mortar in the fallen wall and ice in the mortar. Another of the defendant's witnesses, W. D. McKay, who was working on the building the day preceding the accident, says it was built in the frosty weather, and the wet season following caused it to fall.

The doctrine of *qui facit per alium facit per se* cannot be applied to the owners in this case. The contractors were not their servants within the meaning and application of the maxim.

A very full discussion of the law to be applied to such a set of circumstances as arises here will be found in Ch. 3 of Beven on Negligence, Canadian edition [3rd ed.].

The earlier cases inclined to favour the view that a person is answerable for injury arising out of the execution of a work which he has employed another to do, and to eliminate the distinction between a contract and a servant. *Bush* v. *Steinman*, 1 B. & P. 404, is the leading case setting out this view.

The Courts have gradually withdrawn from this view, and the law as laid down in *Reedie* v. *London and North Western R. Co.*, 4 Ex. 244, correctly sets forth the law to be applied in such case. There a company, empowered by Act of Parliament, contracted with certain persons to construct a portion of the line, and reserved to themselves the power of dismissing any of the contractors' workmen for incompetence. The workmen, in

constructing a bridge over a highway, negligently caused the death of a person passing along under the highway by allowing a stone to fall on him. An action against the company by the administratrix of the deceased failed, and it was held that the terms of the contract did not make any difference. Rolfe, B., said:—

> The liability of any one other than the party actually guilty proceeds on the maxim *qui facit per alium facit per se*. The party employing has the selection of the party employed; and it is reasonable that he who made choice of an unskilful or careless person to execute his orders should be responsible for any injury resulting from the want of skill or care of the person employed; but neither the principle of the rule nor the rule itself can apply to a case where the party sought to be charged does not stand in the character of employer to the party whose negligent act caused the injury.

This view is approved in *Gayford* v. *Nicholls*, 9 Ex. 702—a case where the facts are almost identical with those in the present one. In *Gayford* v. *Nicholls*, the defendant contracted with a builder to erect buildings on the border of his land, which abutted the land and buildings of the plaintiff. In doing the work, the plaintiff's wall was thrown down, and bricks and other material fell on the defendant's land, and were carted away by the contractor's workmen. Parke, B., reversing the County Court Judge's instructions to the jury, said:—

> I am clearly of the opinion that no action would lie unless he (the defendant) carried away the materials himself, or unless that was done by some servant authorized by him to do so as his servant.

There will be judgment on the plaintiffs' claim for the amount of the promissory note, $188.30, and interest and costs. The defendant's counterclaim is dismissed with costs.

Judgment for plaintiffs.

Re CORR.

Ontario High Court, Riddell, J., in Chambers. June 19, 1912.

1. DEPOSITIONS (§ I—2)—RIGHT TO TAKE—CONDITION ON ISSUING FOREIGN COMMISSION—CLAIMANT TO INTESTATE'S PROPERTY.

On a reference to determine who is entitled to the property of a deceased intestate, a claimant may have a commission issued to take evidence abroad, unless it be perfectly plain that the alleged evidence will not be available, or, if it be available, will be wholly useless, and unless the rights of some other party would suffer, but he will be required to pay into Court a sum sufficient to cover the costs of the commission in case he fails to prove his claim.

[*Re Corr*, 3 D.L.R. 367, 3 O.W.N. 1177, varied on appeal.]

Statement

APPEAL by certain claimants of the estate of Felix Corr, deceased, from an order of the Master in Ordinary refusing to direct the issue of a commission to take evidence in Ireland. See the judgment of MIDDLETON, J., 3 D.L.R. 367, 3 O.W.N. 1177.

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The appeal was allowed on certain conditions.

J. S. Fullerton, K.C., and *G. S. Hodgson*, for the appellants.

J. R. Cartwright, K.C., for the Attorney-General.

RIDDELL, J.:—This is another step in the case in which my brother Middleton gave a judgment, 3 D.L.R. 367, 3 O.W.N. 1177.

The proceedings before the Master in Ordinary, which I have been compelled to read, deserve all the animadversions in that judgment; but they may be excused, if not justified, by the circumstance that at the first meeting (as the statement made to me goes) it was suggested by the Master and agreed to by counsel that they would most likely be able to ascertain the person entitled to the estate by having the meetings for and the taking of evidence very informal; and the matter was so carried on without objection by any party and in absolute good faith—all parties apparently believing that some evidence might be picked up that would give a clue to indicate, as between the two Felix Corrs, which was the rightful one. This course should not have been followed, even on consent: the Court is not a Court of inquiry, and the rights of other litigants should not be delayed by the time of the Master being taken by a proceeding not justified by the practice. If the Crown was desirous of an inquiry along the lines suggested, a commission might have issued.

After the judgment already referred to, an application was made to the Master for a commission to Ireland, and this was refused, the master saying: "Apart from matters of practice, the improbability and almost impossibility of producing witnesses whose minds would be sufficiently clear as to what took place a period of 45 or 50 years ago, and who would be able to shew that a certain man who then left Ireland so corresponded with what we know of the Felix Corr, who died in Toronto, as to lead irresistibly to the conclusion that they were the same person—the almost impossibility of it staggers one at the outset. I would consider it quite improbable that a person of sufficient age could recall with the necessary certainty such facts as would satisfy a Court that the two men were the same."

"But apart from that, the motion for leave to pay the expenses of a commission was made before Mr. Justice Middleton, practically by way of an appeal, and it seems to me in the light of his judgment it would be quite useless for me to make an order for a commission, because the Crown would have no difficulty whatever in setting it aside. Therefore, I think, the motion ought to be dismissed with costs."

An appeal is now taken.

So far as the last reason given by the learned Master is concerned, the judgment of Middleton, J., 3 D.L.R. 367, 3 O.W.N.

1177, was on an application for payment out of Court of part of the fund to pay the disbursements of a commission; and, while the learned Judge expressed a strong view as to the value, or want of value, of the evidence to be sought, the decision was based upon the viciousness of the principle involved. I need not say that I entirely agree with my brother Middleton in that regard. But this is quite a different application. The appellants recognize that the onus is upon them to prove their claim—and that, if they fail to prove their claim, they must be barred. It is no longer a friendly inquest, but a law-suit, they are in.

They are desirous of adducing evidence which they believe to be available—and, unless it is perfectly plain that the alleged evidence will not be available, or, if it be available, will be wholly useless, they should be allowed to procure the evidence, unless the rights of some other party would suffer. It is the Crown alone which can be affected by these proceedings. No doubt, the Province can manage to get along for a time without the use of this money—and the money itself is safe and bearing interest. Costs must be considered; and, in case a commission should issue, the appellants would be required to pay into Court a substantial sum—a sum sufficient to cover these costs in case they failed to prove their claim.

No considerable delay need be occasioned; there is no reason why the commission should not be executed during vacation.

From a careful perusal of the material, I am not certain that evidence may not be available which may assist the appellants. There does not seem to be such certainty of the time of the arrival of the deceased in Toronto, much less of his leaving Ireland, as to exclude the Felix Corr through whom a claim is made. Whether witnesses can identify the Toronto Felix Corr by any means with that Felix Corr, is not, to my mind, quite certain. Some minds would, no doubt, place little reliance upon an identification by means of a painting which one lady says "looks like an old horse; nothing like him whatever." In fairness it should be said that to this person the artist said: "I am sorry you have not an artistic eye in your head;" and the artist is confident that he could bring the leading artists in the city that he worked under, that would say it was the work of somebody that knew what he was doing.

If the appellants pay into Court the sum of $400 as security for any costs which may be awarded against them in respect of the commission or the application or order therefor, including this appeal, the execution of the said commission, and the return thereof—and undertake to proceed with all due speed—the appeal will be allowed; costs of the motion and appeal to be disposed of by the Court after the Master's report.

Appeal allowed on terms.

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June 17.

REX v. AMOS CAMPBELL.

Quebec Court of King's Bench (Appeal Side), Trenholme, Lavergne, Cross, Gervais, JJ., and Cooke, J. ad hoc. June 17, 1912.

1. FALSE PRETENCES (§ I—5)—CRIMINAL LIABILITY OF COMPANY'S OFFICERS —SECURING CREDIT BY FALSE REPRESENTATION IN A REPORT.

The president of a company is criminally liable for obtaining credit by false pretences, where goods were secured on credit by the company upon false representations contained in a report made by him for the benefit of the company, where he was the largest shareholder in the company, was benefited by the credit obtained and became thereby indebted himself as a shareholder.

2. CORPORATIONS AND COMPANIES (§ IV G 5—153)—CRIMINAL LIABILITY OF OFFICERS—OBTAINING CREDIT BY FALSE PRETENCES.

An officer of a company is criminally liable under art. 69 of the Crim. Code, providing, among other things, that everyone is a party to and guilty of an offence who does an act for the purpose of aiding any person to commit the offence, where on the strength of a false representation in a report made by him with intent to perpetrate the offence of obtaining credit by false pretences, goods were obtained on credit for the company.

Statement

CROWN case reserved by Carroll, J., on a conviction for obtaining credit by false pretences.

Section 405A of the Criminal Code, 1906, added to the Code by the statute 7-8 Edw. VII. (Can.), ch. 18, provides that—

"Every one is guilty of an indictable offence and liable to one year's imprisonment who, in incurring any debt or liability, obtains credit under false pretences, or by means of any fraud."

The conviction was sustained.

J. A. Lane, K.C., for the prisoner.

Wm. H. Davidson, K.C., for the Crown.

Quebec City, June 17, 1912.

The unanimous opinion of the Court was rendered by

Lavergne, J.

LAVERGNE, J.:—The present case deals with questions of law reserved for the decision of the Court of Appeal.

The indictment against the accused reads as follows:—

The jurors of our lord the King present that Amos Campbell, on or about the fourteenth day of March, in the year of our Lord one thousand nine hundred and eleven, and at different times between the said fourteenth day of March and the sixth day of May, in the year aforesaid, at the city of Quebec, in the district of Quebec, did unlawfully obtain by false pretences from one Siméon Langlois of the said city of Quebec, manufacturer, credit to the amount of five thousand dollars, therefore incurring said debt fraudulently.

At the beginning of the trial by the Crown the accused moved by his attorney for particulars; he wanted to know whether he was accused personally of having made false representations, or whether he was accused as president of the "Campbell Shoe Company."

The Crown Prosecutor declared he relied on the indictment as drawn and the motion was dismissed.

After the Crown had closed its case the accused made two

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motions, one to withdraw the case from the jury, the other to quash the indictment.

The presiding Judge dismissed the first motion, as he considered there was sufficient proof to justify his submitting the case to the jury, and because the accused could suffer no prejudice therefrom.

The second motion, praying for the quashing of the indictment on the ground that no offence had been proven against Campbell personally, was reserved.

This is therefore a simple question of fact which we have to appreciate according to the report made by the trial Judge. The facts as stated by the Judge are admitted to be correct. Here they are:—

> It appears from the evidence made by the Crown and by the defence that the false representations consisted in a report made by Campbell as president of the "Campbell Shoe Company."
>
> Campbell admitted having himself signed this report, and he declared that the goods thus obtained were for the company of which he was the president. Campbell admitted that he was the largest shareholder of the company, and that consequently he benefited by the delivery of the goods made by Langlois.

Under the circumstances the Judge charged the jury substantially as follows:—

> If Langlois parted with his goods on the strength of this false report, and if Campbell knowingly made such a false report with the intention of defrauding, he is guilty in law, although he signed as president of the company. I explained that the distinction between the personal responsibility of Campbell and his responsibility as president of the "Campbell Shoe Company," might perhaps avail in a civil case, but not under the criminal law. After verdict rendered I reserved the question for the decision of your Court in order that it might decide whether I properly charged the jury on this occasion.

The objection of the defence is absolutely technical and subtle, and I am inclined to find the proof sufficient to justify the verdict, because the accused is the largest shareholder of the company, and because he benefited by the credit obtained under false pretences, and because he became indebted himself as shareholder of the company, by obtaining this credit under false pretences.

Moreover, in virtue of art. 69 of the Criminal Code,* he was

*Article 69 of the Criminal Code, is as follows:—
Every one is a party to and guilty of an offence who—
(a) actually commits it; or,
(b) does or omits an act for the purpose of aiding any person to commit the offence; or,
(c) abets any person in commission of the offence; or,
(d) counsels or procures any person to commit the offence.
2. If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been known to be a probable consequence of the prosecution of such common purpose. 55-56 Viet. ch. 29, sec. 61.

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an accomplice, and did commit this act with the intention of helping the company to perpetrate the offence of obtaining credit by false representations, and is therefore guilty as a principal. It is he who caused the offence to be committed by his false return.

I am of opinion to maintain the indictment and to dismiss the demand for a reserved case.

Conviction sustained.

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June 4.

F. J. C. COX, J. Brockest, D. McLean, and D. E. Finch (plaintiffs, appellants) v. CANADIAN BANK OF COMMERCE (defendant, respondent.)

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin and Brodeur, JJ. June 4, 1912.

1. CORPORATIONS AND COMPANIES (§ IV D—67*a*)—POWERS OF MANAGING DIRECTOR—AS TO PROMISSORY NOTES—RIGHT OF BANK TO HOLD NOTE AS COLLATERAL SECURITY.

Upon a bank refusing to discount a company note, which was indorsed by the directors for the sole purpose of being discounted, and insisting upon holding it as collateral security for the company's indebtedness, the managing director had power to consent to so pledging such note, where the latter had, to the knowledge of the bank, been empowered by a resolution of the company, to deal with such bank, and to negotiate with, deposit with, or transfer to it for the credit of the company, bills of exchange, promissory notes, and, under such circumstances, the bank was a holder in due course for value, there being no circumstances which would place it on inquiry.

Statement

APPEAL by plaintiffs (heard on May 10, 1912) from the judgment of the Court of Appeal for Manitoba dismissing the action.

The appellants were directors of the Finch Co., at Winnipeg, which was a customer of the bank there having a liability account which covered straight loans and discounts of trade paper. When a liability of $7,000 had been reduced to $5,000, the directors indorsed the company's note for $2,000 and the manager, Finch, took it to the bank for discount. Within a few days the bank refused to discount the note but claimed the right to hold it as collateral for the company's general indebtedness. The appellants then brought the action for a declaration that they were not liable for the note and to obtain its return and the bank counterclaimed to recover the amount of the note. Chief Justice Mathers entered judgment for the plaintiffs, at the trial, but his judgment was reversed by the Court of Appeal for Manitoba. The indorsement was special to the order of the bank, and the main question on the appeal to the Supreme Court of Canada was whether or not the manager of the company had ostensible authority to pledge the note as collateral, and whether he, in fact, agreed to do so in such a manner as to

constitute the bank a holder in due course for valuable consideration. The judgment appealed from is reported, *Cox* v. *Canadian Bank of Commerce*, 21 Man. L.R. 1.

The appeal was dismissed with costs.

J. B. Coyne, for plaintiffs, appellants.
R. M. Dennistoun, for defendant, respondent.

THE CHIEF JUSTICE (SIR CHARLES FITZPATRICK):—The appeal should be dismissed with costs.

Fitzpatrick, C.J.

DAVIES, J., concurred.

Davies, J.

IDINGTON, J.:—Finch, one of the appellants, was the managing director of a mercantile corporation, and the others were fellow directors thereof. Respondent was their banker.

Idington, J.

By resolutions of the board, the manager or a director appointed, with the accountant of the company, were authorized amongst other things "to borrow money from" respondent "on behalf of the company either by overdrawing the account of the company with the said bank or otherwise" . . . and to "negotiate with, deposit with, or transfer to the said bank (but for credit of the company's account only) all or any bills of exchange, promissory notes, cheques," etc., etc. . . . "also to arrange, settle, balance and certify all books and accounts between the company and the bank," I may incidentally remark that the ingenious suggestion that these powers, though given by the company, do not cover the case of the personal authority to use these endorsers' signatures for another than the specific purpose they gave them for, hardly comes with a good grace from the very men who framed and passed these resolutions intending the bank to rely on them.

A copy of this series of resolutions was on file with the bank for its guidance as to the limit of authority of these officials; who in turn signed a general letter of hypothecation which of course could not enlarge the powers given by these resolutions but was an authority within them as ample as possible thereunder to enable the bank to hold securities given "as a general and continuing collateral security for payment of the present and future indebtedness and liability of the undersigned," (*i.e.*, the company) and any ultimate unpaid balance thereof," etc., etc.

Such were the relations between the corporate bodies when the company in the end of August, 1907, owed the bank and was so pressed by it that the latter desired the personal guarantee of the company's directors for the payment of the latter's indebtedness when called for.

This was refused. Then the notes or acceptances of shareholders for unpaid calls on their stock was suggested. Many

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drafts were made on them but few, if any, accepted before matters became so urgent that at a meeting of the board the appellants agreed to endorse the note of the company for two thousand dollars if the latter would assign them the sum so due for unpaid calls to indemnify them against such endorsements, and the board accordingly passed a by-law to carry this out.

It is clear that the purpose was that such note should when so endorsed be discounted by respondent.

It is equally clear that the bank agent thereafter refused to discount it, but offered Finch, duly authorized as above to deal with securities he had in his hands for purposes of his company in such a way as would enable him best to finance the company, to accept it as collateral for the company's account as a means of strengthening it. He says Finch assented thereto, and the banker accepted it as collateral.

Primâ facie the result of so dealing with the note in question would be to render it a security to which the bank could look for payment of any ultimate balance due by the company. And in default of any restriction as to such general application there is no answer to the bank's claim to hold it and enforce its payment.

It was, so soon as in possession of the bank, placed in the register of collaterals held against this account.

The company's accountant understood from Finch it was used as collateral.

The ledger-keeper, who was also acting accountant in the bank, and the person to ask for its return, if returnable, never heard during its currency of any claim to have it returned, though meeting Finch almost daily.

The manager in effect swears it was properly so treated in accordance with his suggestion and the assent of Finch thereto and that the business done thereafter between the company and the bank proceeded on the faith thereof.

Finch denies his assent thereto, but in that is discredited by the learned trial Judge.

The learned trial Judge, however, not resting upon any express agreement restricting its application to overdrafts and discounts of trade notes, but, by a process of reasoning which I cannot accept, indeed hardly follow, as to the consideration for its deposit having been the granting overdrafts and discounting such trade notes, saw his way to finding such a restricted application of it as a collateral.

These might, as he suggests, be valuable consideration given by the bank and entitling it to hold the security. But unfortunately for the appellants and the reasoning I refer to, there was no such consideration, expressly agreed on as the consideration, much less as being the entire consideration.

The manager in his way of illustrating his meaning does, in a loose sort of way in one place, refer to such subjects as being motives of action.

But, with respect, I think no banker or competent business man would be likely to attach such a restriction as claimed to what he says transpired relative to and as governing the purpose of giving this collateral.

The consideration clearly was the undertaking to carry the account as a whole, and the deposit was made a general collateral to the whole as a basis of credit for such dealings.

Now, was there anything in the way of notice to the bank of the terms upon which the appellants endorsed?

The learned trial Judge expressly finds the bank took it in good faith and without notice thereof.

The only vestige of foundation for believing otherwise was the learned trial Judge's own finding that the bank agent asked or induced Finch to believe that if he got a note so endorsed for two thousand dollars it would be discounted.

A step further in the same direction, making it clear that the bank agent had expressly agreed to such a thing, and as Finch says, followed it up by accepting the note as if discounting it, but later repudiating that under instructions from head office, would possibly have made an arguable case implying knowledge in the bank that the note was got and produced pursuant to such an express agreement for its discount.

Such is not found to be the fact, what is found to be the fact falls far short thereof. In either case it is only by a train of reasoning that knowledge of what the endorsers intended to be done with their endorsement could be imputed to the bank.

Short of such express knowledge or notice, or facts upon which either could be fairly imputed to the bank, it seems to me there could not be rested any such contention as set up here.

The distinction between the endorsing for purposes of discount and collateral security is at best rather fine and perhaps not worth much except in exceptional circumstances. If the appellant had made, as suggested but not proven, a case that the securities furnished the endorsers had been abandoned as result of what the bank did, something more tangible would have had to be dealt with.

I think the appeal must be dismissed with costs.

DUFF, J.:—Finch had no authority in fact to deal with the note as he did. Had he ostensible authority? I think he had. I think his possession, in the circumstances, would, naturally, in the view of the bank manager, imply authority to use it on behalf of the company for the purpose of improving the status of the company's account with the bank in order to procure the advances then urgently needed. *Ex*

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facie, the transaction (as between the directors and the company) was simply an indorsement by the directors of the company's note for the company's accommodation. I cannot see anything in it importing any limitation as to the terms under which the bank was to hold the paper. The natural inference of third parties would be, I think, that such arrangements were left to the discretion of the company as represented by the manager.

The only other point is whether there was any restriction in respect of the classes of advances in respect of which the note was to be pledged. The learned trial Judge held it was to be applied only to secure the overdrafts and certain other specified advances. There is some difficulty in taking that view on the evidence as it stands; and, while I should desire to give the greatest possible weight to the finding of the trial Judge, I think the better view is that which prevailed in the Court of Appeal. I do not, of course, in the least accede to the view that the trial Judge, because he rejected the evidence of Finch on this point, was bound to accept in its entirety that of the bank manager; a variety of circumstances, open to the observation of a trial Judge but excluded from that of a Court of Appeal, might very properly determine his judgment in the rejection of one part while accepting another part of the testimony of a witness. I think, however, that the learned Judge has fallen into some error in not giving sufficient weight to the course of business and to the probability that if there was a departure from it there would have been some record of that either in the bank or by Finch himself. Finch's remark to his accountant seems to give support to the view that the note was to be pledged as collateral security for the indebtedness of the company generally. On the whole I am not satisfied that on this point the Court of Appeal was wrong.

Anglin, J.

ANGLIN, J.:—The defendant Finch, in my opinion, held the note in question and took it to the defendant bank, not as the agent or emissary of the endorsers, but as the president and accredited business representative of the Finch Company Limited, with ostensible authority to use it as he might deem best in the interests of that company. Of whatever actual limitation there may have been upon his authority the bank had no notice. The learned trial Judge has so found.

The learned trial Judge says that "Finch deposited it (the note) as collateral security on the bank's promise that such a deposit would ease up the account and that advances would be allowed as an overdraft and upon trade paper."

The company had the benefit of this consideration. Again, the learned Judge says: "It (the note) was pledged as collateral security only for the company's account."

The evidence warrants these findings and they have been confirmed by the Court of Appeal. A perusal of Finch's evidence has satisfied me that his statements to the contrary are wholly unworthy of belief.

Because, when the note in question in this case matured, the advances allowed on overdraft had been repaid and the trade paper discounted had been taken up (one note of $529.00, however, appears to be still outstanding), the learned trial Judge concluded that all the liability of the defendants had ceased, although the Finch Company still owed the bank some $1,900.00 on the general account to which the note endorsed by them had been pledged as collateral. With great respect, it would seem to me that the learned Judge confused the consideration for which the note was given to the bank by Finch with the indebtedness for which it was pledged as security.

I agree with the majority of the Judges of the Court of Appeal that the plaintiffs have failed to establish any ground for relief from their liability as endorsers and would dismiss this appeal with costs.

BRODEUR, J., agreed that the appeal should be dismissed with costs. Brodeur, J.

Appeal dismissed with costs.

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British Columbia Supreme Court, Murphy, J. February 19, 1912.

1. PARTIES (§ II B—118)—JOINDER OF DEFENDANTS—ACTIONS IN TORT—INTERPRETATION OF RULE.

There is no distinction between actions of contract and actions of tort in respect of the interpretation of the rules as to joinder of parties defendant.

[*Bullock* v. *London General Omnibus Co.*, [1907] 1 K.B. 264, at p. 271, followed; *Compania Sansinena de Carnes Congeladas* v. *Houldcr Bros. and Co., Ltd.*, [1910] 2 K.B. 354, and *Times Cold Storage Co.* v. *Lowther and Blankley*, [1911] 2 K.B. 100, specially referred to.]

2. PARTIES (§ II B—118)—JOINDER OF DEFENDANTS—ACTION FOR PERSONAL INJURIES THROUGH FALL OF BUILDING—REGISTERED OWNER.

Where one is injured by the fall of a building, and a writ is issued against the supposed owner, and it is then discovered that the building is registered in the name of his wife, and she is added as a defendant, the plaintiff cannot be compelled, under the Supreme Court Rules of British Columbia, to elect against which defendant he will proceed.

APPLICATION for an order directing plaintiff to elect which of the two defendants she would proceed against, on the ground that the statement of claim disclosed alternative relief sought in respect of separate torts. Plaintiff was injured by the fall Statement

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of a portion of the coping wall of a building generally supposed to be owned by the male defendant. A writ was issued against him after some negotiations for a settlement, in which he did not deny ownership. After action brought, it was discovered that the building was registered in the name of his wife, and an application to add her as defendant was allowed. After delivery of statement of claim, defendant moved to have plaintiff elect which defendant should be proceeded against.

Sir C. H. Tupper, K.C., in support of the application.

Ritchie, K.C., contra.

Murphy, J.

MURPHY, J.:—It has been held that there is no distinction between actions of contract and of tort when the point under consideration is the interpretation of the rules as to joinder: *Bullock* v. *London General Omnibus Company*, [1907] 1 K.B. 264, at p. 271. The same view is impliedly held in *Compania Sansinena de Carnes Congeladas* v. *Houlder Brothers & Co., Limited*, [1910] 2 K.B. 354, in which, though the action was on contract, various cases based on tort are dealt with as shedding light on the point at issue, viz., the interpretation of the English rules as to joinder, which rules are identical with those governing British Columbia Courts. That being so, I think the decision in that case, which, so far as I can discover, is the latest of the High Court in England on these rules, disposes of this application whether the matter be placed on the footing of the plain language of the rules, as appears to be done by Fletcher Moulton, L.J., or upon the basis that the alleged alternative liability here is one cause of action as regards the investigation of the facts upon which such alleged liability depends, as seems to be the ground for the decision of Buckley, L.J. This view is in accordance with the comment of Bankes, J., in *Times Cold Storage Company* v. *Lowther & Blankley*, [1911] 2 K.B. 100, at p. 107, on the *Compania Sansinena* case. The application is dismissed with costs to the plaintiff in any event.

Application dismissed.

PELLETIER (defendant, appellant) v. DOMINION FLOUR MILLS Ltd. (plaintiff, respondent).

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May 28.

Quebec Court of Review, McCorkill, Malouin and Letellier, JJ. May 28, 1912.

1. ARREST (§ II—15)—WHO MAY MAKE AFFIDAVIT FOR CAPIAS (QUEBEC)—CLERK OF AGENT FOR CORPORATION.

The clerk of a local agent of an incorporated company is competent to make the affidavit for a *capias* in Quebec in respect of the unpaid price of goods sold by the company through such agent.

2. ARREST (§ II—20)—PROCEDURE ON CAPIAS PROCEEDINGS (QUEBEC)—ERROR IN PLAINTIFF'S NAME.

An error in the name of the plaintiff or of the defendant in proceedings by way of *capias* in Quebec is a ground of exception to the form, and cannot be objected to by a petition to quash.

3. ARREST (§ II—20)—SUFFICIENCY OF AFFIDAVIT FOR A CAPIAS—WHERE ACTION AROSE AND DEBT INCURRED.

An allegation in an affidavit for a *capias* in Quebec that "cette dette a été créré de la manière suivante; par un envoi d'un char de fleur vendu et délivré au défendeur, en la bille de Shawinigan Falls, dans le cours de l'automne dernier, 1911" shews sufficiently for the purpose of such an affidavit where the cause of action arose and when the debt was incurred.

4. ARREST (§ II—20)—AMENDMENTS OF AFFIDAVITS—CAPIAS (QUEBEC).

An absolute rule cannot be laid down in regard to amendments of affidavits leading to the issuing a *capias*, each case must be considered on its own merits.

5. ARREST (§ II—20)—AMENDMENT OF AFFIDAVIT LEADING TO ISSUING CAPIAS—ERROR IN PLAINTIFF'S NAME.

An error in the name of the plaintiff in an affidavit for a *capias* in Quebec, which has not misled or prejudiced the defendant, may be amended.

6. ARREST (§ II—20)—WHAT MUST BE SHEWN BEFORE CAPIAS WILL BE MAINTAINED.

In order that a *capias* may be maintained in Quebec, it is necessary to shew the intention of the defendant to leave the Provinces of Quebec and Ontario with the intention of defrauding his creditors.

7. ARREST (§ II—20)—WHEN CAPIAS WILL BE JUSTIFIED—INTENTION TO ABSCOND.

Where goods have been sold to a purchaser in Quebec, and, while the price is still unpaid, he announces his intention of going to the United States, but does not notify the seller of such intention, and about a week before his intended departure he begins to dispose of his property including the goods unpaid for, and pays none of the money so realized to the seller, but pays some of his other creditors, the facts are sufficient to justify the allegation in an affidavit for a *capias* on behalf of the seller that the purchaser is about to abscond from the provinces of Ontario and Quebec with the intention of defrauding his creditors in general and the plaintiff in particular.

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INSCRIPTION in review from a judgment of the Superior Court, Three Rivers, maintaining a *capias* issued at the instance of plaintiff against defendant for the sum of $610.62. The affidavit for the *capias* was made by Jerome Tessier, who, acting as a clerk of the plaintiff, swore to the indebtedness which represented

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the balance due by defendant for a carload of flour sold and delivered to him at the town of Shawinigan Falls in the autumn of 1910.

The ground of the *capias* was:

> Le défendeur est sur le point de quitter les provinces de Québec et d'Ontario avec l'intention de frauder ses créanciers en général et la demanderesse en particulier.

The action as originally taken by the plaintiff was in the name of the Dominion Flour Mills Company. After defendant had appeared, had petitioned to quash and had pleaded to the action as taken, plaintiff moved to be allowed to amend the fiat, affidavit, writ, declaration and all other proceedings by striking out the word "Company" and substituting therefor the word "Limited."

This motion was presented on the date of the *enquête* and was granted. Besides denying the truthfulness of the allegations of the affidavit, defendant specially alleges that Jerome Tessier, who made the affidavit upon which the *capias* issued, was neither the bookkeeper, clerk nor legal attorney (C.P. 898) of the defendant for the making of said affidavit; that at the time said affidavit was made defendant did not owe any sum of money to the Dominion Flour Mills Company and never contracted with it; there is no *lien de droit* between said company and defendant.

Defendant's plea consisted of a general denial. Plaintiff answered the petition to quash generally. The case was inscribed for proof and hearing on the merits of the petition to quash and the contestation of the action for 15th of February last. A long *enquête* was held and plaintiff's action was maintained.

With respect to those allegations of defendant's petition, in which he sets forth the irregularities connected with the issue of the writ of *capias*, the Superior Court held them to be insufficient.

Three questions were now raised: firstly, that Jerome Tessier who made the affidavit was not a legally authorized representative of plaintiff for that purpose; and, secondly, that defendant did not owe the Dominion Flour Mills Company, the corporation which is alleged to have been his creditor; thirdly, the motion to amend plaintiff's name could not be granted because an affidavit cannot be amended.

G. H. Robichon, for appellant.
Bureau, Bigué & Lajoie, for respondent.

The judgment of the Court of Review was delivered by

McCorkill, J.

McCORKILL, J.:—I am of opinion that Jerome Tessier had all the authorization necessary for the making of the affidavit. He was, if not directly on the pay-roll of the Dominion Flour Mills

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Limited, an employee of the company's agent, Fréchette, through whom the sale of the carload of flour was made to the defendant. It was Fréchette who had the control and management of this indebtedness, and, at his request, his employee Tessier made the affidavit in question.

Moreover, what prejudice could the defendant pretend to have if the facts alleged in the affidavit are true and plaintiff is satisfied with what Tessier did for and on its behalf, and at the instance of its representative, Fréchette, in the Province of Quebec?

I am of opinion there was no error in the judgment which held that this objection was insufficient. With respect to the error in the name under which plaintiff sued the defendant, I am of opinion it could not be formally raised in a petition to quash. This is a ground of exception to the form. Defendant made no exception to the form and, in my opinion, the Court could not deal with that question in a petition to quash, and this formal objection is untenable on a petition.

Defendant denies his indebtedness to the Dominion Flour Mills Company. He certainly did not owe the Dominion Flour Mills Company. He had no doubt, however, who was suing him as appears by the following:—

> Q. Vous avez compris que c'était pour ce que vous deviez a la Dominion Flour Mills Limited, qu'on vous arrêtait ainsi, n'est-ce pas?
> R. Oui, monsieur.

It is true that a corporation is required to sue in its corporate name, and plaintiff having been incorporated under the name of the "Dominion Flour Mills Limited," should have sued defendant in that name. It was merely by error that the proceedings issued in the name of "The Dominion Flour Mills Company."

The evidence shews that the defendant was not misled by the action having issued in the name of "The Dominion Flour Mills Company." He knew it was for the balance of the price of the carload of flour which had been sold to him in the autumn of 1911 by Fréchette, plaintiff's agent. Defendant did owe the "Dominion Flour Mills Limited."

Plaintiff at the *enquête* made a motion to amend, which was granted. The defendant never complained that he would be prejudiced by the amendment and did not ask that he be permitted to replead if the motion were granted, and that question was not raised before us. The judgment granting the motion merely set the plaintiff right before the Court as to its correct name.

It was objected by the defendant that the judgment granting the motion to amend was illegal, because an affidavit could not be amended, and if an affidavit could not be amended, the other

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proceedings which depended upon the affidavit could not be amended. A large number of authorities were cited by defendant in support of his contention that an affidavit could not be amended.

It is to be observed that the amendment which plaintiff sought merely corrected a slight error in the name under which it had sued.

The authorities, with one exception, cited by defendant, all have reference to the amendment of the body of the affidavit and not the name. One of the authorities has reference to the name of the defendant. Certainly, if plaintiff had sought to amend an important allegation in the body of the affidavit, defendant's objection, in my opinion, would have been much more serious, and I doubt very much if the learned trial Judge would have granted it. But that is not the case here, and the granting of that motion caused no prejudice whatever to the defendant. He knew who was suing him. I am of opinion that a cast iron rule cannot be laid down with respect to amendments, each case must be considered upon its own merits.

It was the Dominion Flour Mills Limited which was suing the defendant, and if an error appeared in the description, it was a slight one, which, in my opinion, could be corrected unless it was shewn by the defendant that it caused him a prejudice. There is no proof of record that there is any company called "The Dominion Flour Mills Company," with which the defendant had transaction, and that in seeking the amendment in question, one corporation was being substituted for another.

I do not think there was anything inconsistent or contradictory in granting the motion to amend the title of the plaintiff as mentioned, and there was no error on the part of the learned trial Judge in so holding. The amendment having been allowed, it wiped out a number of grounds of defendant's petition to quash, which are based upon the contention that the defendant did not owe the Dominion Flour Mills Company.

Two other grounds of the petition are: that the affidavit does not allege that the debt was payable within the limits of the province of Quebec or Ontario; or on what date it was incurred.

The affidavit alleges:—

> Cette dette a été créée de la manière suivante: par un envoi d'un char de fleur vendu et délivré au défendeur, en la ville de Shawinigan Falls, dans le cours de l'automne dernier 1911.

Surely that is sufficient to shew that the cause of action arose at Shawinigan Falls, in the district of Three Rivers, upon a debt incurred in the autumn of 1911, and, therefore, within five years of the institution of the action, and that the action was properly taken within the district of Three Rivers.

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In the affidavit and fiat the defendant's name spells "Peltier"; in the writ it is spelled "Pelletier." Defendant urges that the latter is the proper way to spell his name, and, therefore, that the writ of *capias* issued without the proper affidavit. This, in my opinion, is not a reason which can be urged by a petition to quash, but should have been objected by an exception to the form, and, in any event, it causes no prejudice to the defendant and was properly dismissed.

Defendant next contends that because the affidavit contained no mention of the secreting of his effects with the intention of defrauding his creditors, evidence to that effect was illegal and, in any event, it was untrue. As I have already mentioned, the declaration alleges secretion, as well as the intention to leave the province with fraudulent intent.

In order that the *capias* should have been maintained, it was necessary that the plaintiff must have proven defendant's intention to leave the provinces of Quebec and Ontario with the intention of defrauding his creditors. The mere fact that he intended to leave would have sufficed. The departure must have been fraudulent.

I know of no law to prevent plaintiff alleging in his declaration such facts as will tend to bear out the allegations mentioned in the affidavit, and of proving them; and even upon the petition to quash plaintiff was entitled to prove any facts which would tend to shew that defendant's departure from the province was fraudulent.

By proving the secretion which was to be followed immediately by a departure for the United States, it would help the Court to arrive at a conclusion as to whether or not the departure was fraudulent.

While defendant still possessed a large portion of the flour which had been sold to him by the plaintiff, and about a week before his intended departure for the United States he began selling and disposing of his property, including the flour, some of which he sold in bags, others of which he sold after having manufactured it into bread. None of the money which he realized for this property did he pay over to the plaintiff, nor did he notify the plaintiff or its representative of his intention to leave for the United States. He paid the favoured among his creditors and intended to allow plaintiff to whistle for its claim.

Defendant's own deposition convicts him. On page 14 of his deposition, he says:—

> Après que j'ai eu payé mes créanciers a Shawinigan Bay et a Shawinigan Falls, monsieur, il ne me restait pas grand'chose après cela il me restait a peu près $70.00, après avoir vendu mon ménage.
>
> Q. Vous deviez $100 a M. Edgard Guillemette dans le temps, n'est-ce, pas? R. Oui, monsieur.

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Q. Vous avez payé ce montant â M. Guillemette, n'est-ce pas, M. Pelletier? R. Oui, monsieur.

Q. Cependant vous n'avez pas jugé a propos d'avertir M. Fréchette ici présent, l'agent de la demanderesse, de cette vente la, ni de votre départ? R. Non, monsieur; je n'y ai pas pensé dans le temps.

With respect to his departure, to some he said he was going West, to others he said he was going to Nashua, New Hampshire. He even told this to one of his relatives where he was having his wife do some writing for him.

The evidence of the illegal sale and the fraudulent, preferential payment of some of his creditors to the injury of the plaintiff and any other unpaid creditors, taken in connection with his intended departure for the United States, without notifying plaintiff thereof, or making arrangements for an extension of delay to pay, in my opinion, is quite sufficient to have warranted the allegation in the affidavit: "Le défendeur est sur le point de quitter la province de Québec, etc."

The defendant has admitted in his evidence, and plaintiff has amply proven the indebtedness alleged. There is, therefore, no error in the judgment maintaining the writ of *capias* and proceedings had thereunder, and condemning defendant to the payment of the amount claimed by plaintiff.

The inscription in review is, therefore, dismissed, with costs.

Appeal dismissed.

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McPHERSON v. FARIS.

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June 22.

Alberta Supreme Court, Scott, Stuart and Simmons, JJ. June 22, 1912.

1. Sale (§ II C—37)—Warranty of horse—Vicious disposition developed after sale—Right to rescind.

A sale of a stallion cannot be rescinded by the purchaser because of the animal's vicious disposition where the evidence shewed that it had been quiet and gentle while the vendor owned it, except on one occasion when it attacked him, of which the vendor told the purchaser before the sale, though subsequently the horse became entirely unmanageable and dangerous.

2. Sale (§ III B—66)—Rights of parties—Purchaser giving a note for purchase price after learning of vicious disposition of horse—Waiver of misrepresentation.

If the purchaser of a stallion did not, before the agreement for sale was made, have notice of an attack it had made on the vendor, and that was sufficient to amount to misrepresentation sufficient to avoid the sale, it was waived by the giving of a note for a part of the purchase money after learning such fact.

Statement

Appeal by plaintiff from the judgment at the trial (Beck, J.), dismissing plaintiff's action in replevin for eight geldings, the subject of a horse trade made between them. The defendant counterclaimed for the return of the geldings, which had been seized in the replevin proceedings and had been delivered to the plaintiff.

On the 11th May, 1911, the parties entered into a verbal agreement whereby the plaintiff agreed to sell to the defendant two stallions, named respectively "Pius"and "Joe Jefferson," and, in consideration thereof, the defendant agreed to deliver to the plaintiff the eight geldings in question and a stallion named "Montrose Layman," and to pay him $275 in cash. The stallion "Joe Jefferson" had been in the possession of the defendant for some time before the agreement was entered into. The other stallions were delivered under it on the day it was entered into, and the understanding was, that the geldings were to remain with the defendant until the plaintiff was ready to remove them. On the 26th May the parties met at Red Deer, when the transaction was closed by the defendant giving the plaintiff his promissory note for the $275, and transferring to him the certificate of registration of the stallion "Montrose Layman."

The eight geldings remained in the possession of the defendant until taken by the plaintiff under a writ, the defendant having refused in the meantime to deliver them to the plaintiff.

The defendant alleged, by way of defence to the action, that during the negotiations leading up to the agreement and at the time it was entered into, the plaintiff represented to him that the stallion "Pius" was quiet and gentle, and that he guaranteed it to be a 60 per cent. foal-getter, whereas, to the knowledge of the plaintiff, it was vicious and uncontrollable and was not a 60 per cent. foal-getter.

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Scott, J.

The appeal was allowed and judgment given for the plaintiff in replevin, and the counterclaim was dismissed with costs.

A. H. Clarke, K.C., for the plaintiff.

A. A. McGillivray, for the defendant.

SCOTT, J.:—It is clear from the evidence that this stallion was quiet and gentle at the time the agreement was entered into, and had been such from the time the plaintiff purchased it in May, 1909, except that upon one occasion in January, 1910, when the plaintiff was feeding it in its stall, it caught him with its teeth by the back of the neck, and he appears to have had difficulty in escaping from it. He gave the animal a beating at that time, and thereafter up to the time of the sale to the defendant it never exhibited any indication of having a vicious disposition. It appears to have been well under control. The plaintiff's wife used to feed it from time to time, and young girls were permitted to ride it. The plaintiff states that during the negotiations with the defendant he told the latter about the attack the stallion had made upon him, but the latter denies this, although he admits that he had previously heard a rumour that the plaintiff had been attacked by a stallion, but that he had not heard that it was "Pius" that had attacked him. He also admits that, when he met the plaintiff at Red Deer on the occasion when the note was signed, but before it was signed, the latter told him about the attack "Pius" had made upon him. Some days before that meeting "Pius" had made an attempt to bite his groom and had chased him around the corral until he made his escape therefrom, and on the same day it attempted to attack the defendant and some others who were standing outside the corral. At that meeting the defendant told the plaintiff about those attacks. The plaintiff says that the defendant, in speaking of them, treated it as a joke, and as an exhibition of playfulness on the part of the animal.

The defendant, on the other hand, states that it was the plaintiff who said that it was only playfulness, and that he (the defendant) treated it as a serious matter, and that he said to the plaintiff, "Good Lord, Mac, he is playing it pretty hard! You would not think he was playing if you were there."

Subsequent to the giving of the note the stallion became entirely unmanageable. It again attacked and wounded the groom; escaped from the stable or corral and became a source of danger to the defendant and his family, as it would attack every person who appeared about the premises. The defendant finally succeeded in recapturing it. He then took it back to the plaintiff's place and left it there, though the latter refused to receive it. It is admitted that it afterwards died there. The plaintiff admits that, during the negotiations, he told the defendant that "Pius" was quiet and gentle. The latter denies

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that any such statement was made by the former, and states that he never asked the former as to its disposition, as he had satisfied himself upon that point by inspecting the animal and observing its conduct.

The learned trial Judge, in his judgment, stated that he believed the evidence of the defendant, and found that there was misrepresentation by the plaintiff, in that, while he had, during the negotiations, related to the defendant certain circumstances tending to shew the gentleness of the animal, he had failed to inform the defendant of the attack which the stallion had made upon him, the plaintiff, and that, although he had told the defendant about it before the giving of the note, he had not made sufficiently clear to the latter the seriousness of that attack, and had endeavoured to discount its seriousness by suggesting that the subsequent conduct of the animal was merely playfulness on its part; and that, therefore, the giving of the note would not operate or be construed as a waiver of the misrepresentation.

There is nothing in the evidence to shew that, when the defendant was told by the plaintiff of the attack the animal had made upon him, he did not make full disclosure of the circumstances attending it, or that he in any way endeavoured to convey the impression that it was unimportant. It is, therefore, apparent that, before he gave the plaintiff the note for $275, he had as full knowledge as the plaintiff had of the disposition of the animal, and was, therefore, in as good a position as the plaintiff to form an opinion as to its disposition. Even if the plaintiff afterwards attempted to discount the effect of the subsequent attack upon the defendant's groom, it is apparent that the attempt failed, as the words used by the latter at that time shew that he considered it a serious matter.

Assuming that the plaintiff had not, before the agreement was entered into, told the defendant of the attack the animal had made upon him, and that his omission to do so was a *suppressio veri*, which amounted, under the circumstances, to a misrepresentation, I am of the opinion that the fact that the defendant signed the note and closed the transaction with full knowledge of that attack, must be treated as a waiver by him of that misrepresentation, and that the learned trial Judge erred in holding to the contrary.

The defendant counterclaimed for the return of the geldings or their value, and for certain damages which he would be entitled to recover only in the event of the agreement being rescinded by reason of the misrepresentation referred to, and also for damages for breach by the plaintiff of an agreement to break land. There is evidence of such an agreement, but it is shewn that it was subject to a condition which was not fulfilled. The learned trial Judge held that the whole contest was practically

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Scott, J.

over one thing; and he, therefore, without reference to the claim or counterclaim, gave the general costs of the entire action to the defendant.

In my opinion, this appeal should be allowed with costs and judgment entered for the plaintiff in the Court for the return of the geldings in question, with costs of the action, and that judgment should be entered for him on the defendant's counterclaim with costs.

Stuart, J.

STUART, J.:—I think this appeal must be allowed. With much respect for the opinion of the trial Judge, I think he must have overlooked some very important portions of the testimony given. The defendant said, in his evidence, "I suppose the man was recommending his horse. Certainly the horse was gentle, although that was not questioned. I never asked him for any guarantee as to the gentleness of the horse."

The defendant drew up a document which he expected the plaintiff to sign, and in that document, although there is mention made of other guarantees, there is no reference to the gentleness or quietness of the horse at all.

In the face of this I am unable to see how it can be concluded that the defendant relied upon any representation as to gentleness. I think if he was consciously relying upon any such representation, he would have asked for a guarantee in regard to it.

Furthermore, I am convinced that the defendant, before he signed the note, had acquired as much information about the disposition of the horse as the plaintiff himself had; and I think that, by signing the note, he must be taken to have waived any complaint as to misrepresentation. Finally I must, with respect, disagree with the finding as to the existence of actual viciousness prior to the agreement. It is common knowledge, and in any case is abundantly shewn by the testimony of witnesses, that any stallion will do what the stallion in question did at Hewson's place, particularly when he is being fed his oats.

The appeal should be allowed with costs, and the judgment below set aside, and judgment entered for the plaintiff for the delivery to him of the horses in question and for his costs of the action.

Simmons, J.

SIMMONS, J., concurred.

Appeal allowed.

LEGEAS v. TRUSTS AND GUARANTEE CO. (administrators).

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Alberta Supreme Court. Trial before Beck, J. February 6, 1912.

1. CONTRACTS (§ I C 2—26)—SUFFICIENCY OF CONSIDERATION—AGREEMENT TO WILL PROPERTY—WOMAN PERFORMING HOUSEHOLD WORK.

A binding contract arises from the performance, by a woman, of household work, for a man in consideration of his promise to make her a testamentary gift of all of his property.

[See also *McGugan* v. *Smith*, 21 Can. S.C.R. 263, and *Kinsey* v. *National Trust Co.*, 15 Man. R. 32.]

2. WILLS (§ I C—31)—REVOCATION—EFFECT OF—WILL EXECUTED PURSUANT TO AGREEMENT—HOUSEKEEPER PERFORMING HER PART.

Where a will which gave a woman all of the property of a testator, was executed in consideration of her agreement to keep house for him during his lifetime, was, without her knowledge, subsequently revoked, she may, upon the death of the testator, recover from his estate the total value thereof, less the amount of his debts and the expense of administration.

3. EXECUTORS AND ADMINISTRATORS (§ II A 1—25)—RIGHTS OF ADMINISTRATOR UNSUCCESSFULLY OPPOSING CONTEST OF WILL—COSTS — CONDITIONS OF APPEALING.

An administrator is justified in contesting a claim of a woman for all of his decedent's property because of the breach of the latter's agreement to devise it all to her in consideration of her keeping house for him during his lifetime, since he could not safely recognize the binding force of the claim without a decision of a Court in its favour and therefore he will be allowed his costs from the estate.

Statement

TRIAL of an action brought by Mary Legeas against defendant company as administrators of the estate of Ezra Ferguson, deceased, to enforce an agreement alleged to have been made by deceased to leave her all his property in consideration of her keeping house for him or for damages for the cancellation by deceased of a will made by deceased in conformity with the alleged agreement and found after his death with the signature erased; or, in the alternative, for compensation for her services as housekeeper.

The evidence shewed that the deceased had erased his signature to the will owing to a quarrel with the plaintiff and with the intention of revoking the will made in her favour.

B. Pratt, for the plaintiff.

A. Knox, for the defendants.

Beck, J.

BECK, J.:—I am satisfied, upon the evidence, that there was an agreement to the effect set up by the plaintiff, that, if she should go and live with Ferguson, take her family there, and if, after a month or two, they were each satisfied with the other, then, if she would do all that class of work that a woman in her condition of life, living on such a farm as they were living upon, usually does, and would continue to do so, he would, when he died, leave her the whole of his property. I have not the faintest doubt about the truth of the evidence on that point—that there was such an agreement.

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Beck, J.

I think it is hardly arguable that the old man did not actually make such a will; and the conclusion I have come to is, that he revoked that will in June, 1910, as shewn by the evidence of Durstling, immediately after the quarrel that arose after Durstling and Ferguson were at the plaintiff's house, and that up to that time he had the intention of carrying out his agreement; that he had carried it out up to that time; and that, owing to that quarrel, he revoked his will and thereby broke his contract.

Now, there was some contradiction or what appeared to be a contradiction of the evidence of the plaintiff by Mundy and Eecker. Now, I believe the plaintiff's account of what took place on that occasion, and I do not believe the account given by Mundy and Eecker, where it contradicts hers. I am not going to the extent of saying that I believe that they wilfully misrepresented things; but my explanation of it is, and I have little doubt but that it is the correct explanation, that they misunderstood her; at all events, I believe her account of it. She speaks, as everybody who has been listening to her must know, most indifferent English, and they might very easily have misunderstood the statement they say she made, that she knew the will was not signed. I am quite satisfied that she never made any such statement, and I am satisfied that up to that time she supposed that the will was good, had no knowledge that he had revoked it, as I am satisfied he did, as I have already said, in June of the previous year.

Now, that being my finding on the facts, I think, as a matter of law, it is a binding contract, and that this Court has power and ought to give effect to it. I see by the papers put in in connection with the issuing of the letters probate that the estate is sworn at $3,223.21. It is said that there are some debts. I think that might be presumed. Certainly there are the funeral expenses, there are the costs of the administration proceedings, the compensation of the administrator. There will be, no doubt, several hundred dollars by way of the ordinary deductions for payment of funeral expenses, for the few debts which we may suppose are in existence, without any evidence of there being any in fact, and the costs of the administration. This amount will have to be deducted from the sworn value of the estate.

Now, with regard to this action, I think, the administrators were quite justified in contesting the matter. This agreement was a thing which had to be established in just such a way as it has been proved, by proving it in an action, and the administrators could not safely recognize it unless there was a decision of the Court in favour of the plaintiff. For that reason, while I find in favour of the plaintiff, that her claim is established, and while I must give judgment for her, with the

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LEGEAS v. TRUSTS & GUARANTEE CO.

Beck, J.

costs of the action, I think that not only her costs of this action but the costs of the defendants in the action ought to be paid out of the estate. As I say, the administrators could know, with such certainty as would make them safe in acting, whether the plaintiff's claim was a valid or invalid one, only by just such a trial as has taken place. Now, when the costs on both sides of the action are taken out of the estate, I think the whole residue of the estate will be little enough for the plaintiff to receive in compensation for her services or as a compensation for the breach by Ferguson of the contract which I have held has been established.

Now, I think I should add this. If there is any idea of appealing from my decision, I think that the administrators would not be justified in doing that upon their own responsibility. They are protected by the decision which I now give. If there is to be any appeal, I do not think they would be protected, if they failed in the appeal, by having the costs of the appeal ordered to be paid out of the estate. If the beneficiaries, or rather those persons who would be beneficiaries but for this judgment, wish to appeal, I think the defendants have a right to insist upon their being indemnified for the costs of the appeal.

Judgment for plaintiff.

CANADIAN PACIFIC R. CO. v. SMITH.

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May 24.

Board of Railway Commissioners. May 24, 1912.

1. EMINENT DOMAIN (§ III E 2—174)—RAILWAY CUT-OFF OR SPUR LINE—RESIDENTIAL DISTRICT—OBJECTIONS.

The Railway Commission will usually follow the principle that a railway company desiring to take land of a private individual should be given that right provided the individual can be properly compensated for his land and for damages to adjoining land, but it is a ground for refusing to give the railway company that privilege that the proposed railway line is a cut-off for freight only which if permitted would run through a valuable suburban subdivision for the development of which the land proprietor had dedicated large sections for the construction of driveways and parks, which might be expected to benefit both the suburban locality and the adjoining city and so be considered as in the nature of a public undertaking.

Statement

APPLICATION of the Canadian Pacific Railway, under section 222, for authority to construct a spur from a point on its Toronto to London line (Ontario and Quebec), lot 10, concession "G," township of Etobicoke, Ontario; thence northerly for distance of 4.55 miles to connect with Toronto to Owen Sound line (Toronto, Grey and Bruce), in lot 11, concession 5, township of York, and under section 237, for authority to construct its proposed Lambton to Weston line across and to divert certain highways in townships of York and Etobicoke, Ontario.

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CANADIAN PACIFIC R. CO. v. SMITH.

Asst. Chief Commissioner.

ASSISTANT CHIEF COMMISSIONER (oral):—With regard to the application of the Canadian Pacific Railway to construct a connecting line in the western part of the city through the property, or chiefly through the property, represented by Mr. Home Smith.

The railway company is desirous of constructing that line to assist them in the hauling of freight cars from one line to another. At present they have to come to a point further east of the location in question, and a point of some congestion, running east and west and then switch on to a track running approximately north and south. Their idea is to cut off two legs of this triangle by building a connecting line up, which was to be the third leg.

This is for the convenience of the railway company only. It is not suggested that it will be of any benefit to the travelling public. Of course, indirectly, it will be a benefit to the shipping public. I presume, in this way, that the railway company will be able to give them a better service, but that will be an indirect benefit. It would be no benefit to the shipping public from a financial point of view, because it is not suggested that the rates would be reduced, or anything of that kind take place. It is chiefly a matter of convenience for the railway company.

The Board usually follows the principle that a railway company desiring to take land of a private individual should be given that right, provided the individual can be properly compensated for his land and for damages to adjoining land.

In this case, while Mr. Smith is in this thing as a venture, expecting to make money out of it, still the property is to my mind in a different position to that in the case of an ordinary private owner. Mr. Smith has dedicated over 100 acres of land, we are told, to the public for the purpose of building driveways and parks. This is a very beautiful section of the country. Toronto is a growing city, and it will be a very great benefit, not only to the individual landowners, but to the whole of the people of Toronto, to have these driveways and parks, and this embellishment and development in this section of the community, and I do not see that Mr. Smith, or the Toronto public who have this advantage, could be properly compensated in dollars and cents for the damage the railway company would do if their application was granted. It would be more or less problematical what might happen in the future, but bearing in mind the importance of the development that has taken place, and the settled policy and plans with which the city has concurred, and the development in that locality, we look on this as more or less a public undertaking, and we have come to the conclusion—that is, Dr. Mills and myself, Mr. Goodeve dissenting—that the application of the railway company should be refused.

It has been shewn to us that the railway company can get another route, not as cheaply—it will cost them more money undoubtedly—but it is a question of expense as far as they are concerned. It is not an impossibility to secure their desired end by another way, avoiding the injury to this property that I have attempted to describe.

Therefore, we have come to the conclusion that the application should be refused.

Application refused; COMMISSIONER GOODEVE *dissenting.*

Re McGILL CHAIR CO. (MUNRO'S CASE); and Re MATTHEW GUY CARRIAGE AND AUTOMOBILE CO.

Ontario High Court, Middleton, J., in Chambers. May 27, 1912.

1. APPEAL (§ XI—721)—LEAVE TO APPEAL—WINDING UP OF COMPANY—SETTLING CONTRIBUTORIES.

The policy of the Winding-up Act, R.S.C., ch. 144, as to appeals from orders settling the list of contributories of an insolvent company, is that after the first appeal to a Judge in Court from the decision of the referee, leave to appeal from the order of the Judge to the Court of Appeal should not be granted unless the question to be raised upon the appeal involves future rights or is likely to affect other cases of a similar nature in the winding-up proceedings.

[*Re McGill Chair Co.*, 5 D.L.R. 73, 26 O.L.R. 254, 3 O.W.N. 1074, and *Re Matthew Guy C. and A. Co.*, 4 D.L.R. 764, 26 O.L.R. 377, 3 O.W.N. 1233, specially referred to.]

Statement

MOTION by Munro, in the first case, for leave to appeal from the order of Meredith, C.J.C.P., *Re McGill Chair Co.*, 26 O.L.R. 254, 3 O.W.N. 1074, allowing the appeal of the liquidator in a winding-up proceeding from an order of the Local Master at Cornwall, and directing that the name of Munro be put upon the list of contributories in respect of two shares.

J. A. Macintosh, for Munro.

George Wilkie, for the liquidator.

Motion by the liquidator, in the second case, for leave to appeal from the order of Middleton, J. *Re Matthew Guy C. and A. Co.*, 4 D.L.R. 764, 26 O.L.R. 377, 3 O.W.N. 1233, allowing the appeal of the directors of the company in a winding-up proceeding, from the order of the Master in Ordinary requiring the directors severally to repay certain sums received by them from the company in remuneration for services rendered.

G. H. Kilmer, K.C., for the liquidator.

F. S. Mearns, for the directors.

Middleton, J.

MIDDLETON, J.:—In each of these cases an application is made for leave to appeal to the Court of Appeal from the judgment of a Judge in Court upon an appeal from the decision of the

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Master during the course of a liquidation. The cases have nothing in common save that they involve the consideration of the circumstances under which such leave ought to be granted.

The Dominion Winding-up Act itself, R.S.C. 1906, ch. 144, sec. 101, indicates the policy of the Act, viz., that the decision of a single Judge should be final unless the question to be raised upon the appeal involves future rights or is likely to affect other cases of a similar nature in the winding-up proceeding. Leave may also be granted if the amount involved exceeds $500. This policy is, no doubt, based upon the view that in cases not falling within the lines indicated it is better that there should be an end of the litigation, and a speedy distribution of the estate, rather than the delay and expense necessarily incident to an appeal. There is not, so far as I know, any reported decision in which the principles to be applied have been the subject of any discussion.

In *Re McGill Chair Co.*, the judgment in question is reported 3 O.W.N. 1074, 26 O.L.R. 254, 5 D.L.R. 73. The decision does affect other cases in the particular winding-up, all the stock of the company having been issued as bonus stock.

The appeal is sought by the shareholder, who thus assumes the risk of costs; and the point involved is certainly of importance. The amount actually in question in all is said to be very considerable. I think it is a proper case in which to permit the further appeal sought.

In the other case, *Re Matthew Guy Carriage and Automobile Co.*, the judgment in question is reported in 3 O.W.N. 1233, 26 O.L.R. 447, 4 D.L.R. 764. No other cases are involved in this liquidation; no future rights are involved; and the amount in question, while nominally just beyond $500, is really very uncertain, as the parties upon whom liability was imposed by the Master are said to be financially worthless, except in the case of one whose financial position is problematical.

The order in question having been pronounced by myself, my inclination is to give the freest possible right of appeal. I suggested to counsel the propriety of having the motion enlarged before some other Judge, for this reason; but counsel preferred that I should deal with the matter myself. As a matter of precaution, I discussed the circumstances with one of my brother Judges. He agreed with me in thinking that this is not a case in which a further appeal ought, in the interest of the liquidator and creditors, to be allowed.

The order sought will, therefore, be granted in the first case (costs in the appeal); and will be refused in the second (with costs).

Orders accordingly.

La Compagnie des **POUTRES SIEGWART** v. **DESCHAMBAULT.**

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Quebec Superior Court, Lemieux, A.C.J. March 13, 1912.

1. MUNICIPAL CORPORATIONS (§ II D—142)—LIABILITY FOR DAMAGES ON FAILURE TO CARRY OUT ULTRA VIRES CONTRACT—NON-OBSERVANCE OF STATUTORY REQUIREMENTS AS TO PUBLICATION.

Where a municipal by-law and a contract based upon it for the construction of certain works have both been annulled by the Courts for non-observance of the necessary formalities in regard to the publication of the by-law, but the subject-matter of the by-law and contract are within the powers of the municipality, the opposite party is entitled to recover from the municipality the damages he has suffered from the inexecution of the contract.

2. PLEADING (§ I C—27)—DEFINITENESS—MUNICIPAL BY-LAW—NECESSITY OF ASSERTING VALIDITY OF.

Where art. 697 Quebec Municipal Code provides that "the promulgation of every municipal by-law is considered to have been sufficiently made until the contrary is alleged," it is not necessary that this allegation should be made in an action at law but it is sufficient that the interested party be informed by the municipal council of the irregularity; consequently, the value of work done by a contractor under a contract based on such a by-law after notice of the irregularity has been given by the council but before any action to set aside the contract or by-law is taken cannot be recovered.

3. DAMAGES (III A—42*a*)—BUILDING CONTRACT—MEASURE OF DAMAGES—TENDER ACCEPTED BY MUNICIPAL CORPORATION—CONTRACT ULTRA VIRES.

Where a tender for the construction of work accompanied by plans and specifications has been accepted and a contract made accordingly, but the contract is not carried out through the fault of the party calling for tenders, the contractor is entitled to recover the value of the plans and specifications, especially when the opposite party has retained them and made no offer to return them.

Statement

THIS action for $1,870.75, is for damages caused to the company defendant by the failure of the corporation of Deschambault to carry out a contract of January 7th, 1911, by which the corporation agreed to pay the Compagnie des Poutres the sum of $9,800 for the construction of eleven bridges to be delivered on November 1st, 1911.

Judgment was given for the plaintiff for $518.75.

Cannon & Forest, for the plaintiff.

A. Corriveau, K.C., for the defendant. *L. T. Chaloult*, K.C., counsel.

Lemieux, A.C.J.

QUEBEC. LEMIEUX, A.C.J.:—The corporation has pleaded, substantially, that the contract in question was void because it had been made under a municipal by-law which was not in force; that this by-law and the contract resulting from it had been annulled by a judgment of the Court; that consequently the corporation was not responsible for damages incurred by the plaintiff through the inexecution of the contract. We will supplement this summary statement of the respective pretensions of the parties by relating, in their chronological order, the facts and

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circumstances which preceded and followed the by-law and the contract upon which the action is based, and we will accompany the whole with comments which will assist us in arriving at a conclusion.

The question of the manner of maintaining and reconstructing the bridges in the municipality of Deschambault had been discussed warmly and at length during the year 1910. The question presented all the more interest as there were eleven bridges in the municipality to be rebuilt. The municipal council held upwards of fifteen special or general meetings in regard to the matter between February 7th, 1910, and January 20th, 1911. The reason for all these deliberations is expressed in a resolution of the council which was passed at the meeting on June 6th, and in which it is declared that the roads and bridges of the municipality were in a dangerous and deplorable condition which necessitated their immediate reconstruction. To remedy this state of affairs, the council at the same meeting declared that it was desirable that the roads and bridges of the municipality should be made and maintained at the expense of the municipality, according to article 535 of the Municipal Code.

The council evidently wished to avail itself of a decision regarding the construction, maintenance and repairing of municipal roads at the expense of the municipality which was rendered by us in the case of *The Corporation of Grondines* v. *The Corporation of Portneuf*, 40 Que. S.C. 289, and confirmed in appeal. At this meeting of June 6th the council further declared that, although this rebuilding of eleven bridges would burden the municipal budget, it was desirous of giving an example of good roads in the province, and that to this end it was counting upon the support of and a grant from the government. This resolution was unanimously adopted. It was, however, only on the 5th December that the council passed a by-law (No. 6) ordering that all bridges having more than eight feet span should be made and maintained at the expense of the municipality. This by-law provided that it should come into force and effect within the delay required by law.

At this meeting of December 5th, 1910, the secretary-treasurer was authorized, upon a motion made by councillors Mayrand and Noé Montainbault, to call for tenders in the papers for the building of eleven bridges, which tenders would be received until December 26th, then instant. We should notice that this by-law, according to article 535, Municipal Code, could only enter into force on the first day of January following its promulgation. Although the delay between December 5th, the date of the by-law, and January 1st, 1911, was limited, the by-law could, with ordinary diligence, have been promulgated before January 1st. The thing was possible if the by-law had

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been posted on the 6th December and published on the following Sunday. But the secretary-treasurer, who was a hostile party to the construction of the bridges, manifestly and deliberately, we think, frustrated the wishes of the majority of the council by only giving notice of the by-law on the 17th and public reading of it on the 18th. He admits himself, in his evidence, that if he did not promulgate the by-law at an earlier date, it was because he was at that time in the woods on his own business and he neglected the business of the corporation. We may add that it was the action of the secretary and his delay in publishing the by-law which are the cause of this law-suit and of the tax-payers being deprived of municipal bridges, the reconstruction of which was urgent, as they were in a dangerous state.

Whatever may have happened in regard to the publication of the by-law, Naud, the secretary, according to the orders he had received from the council at the meeting of December 5th, called for tenders in the newspapers, (*La Patrie* and *Le Soleil*) for the construction of the eleven bridges in question,—tenders which were to be accompanied with plans and specifications, subject to the approval of the government.

The Compagnie des Poutres, plaintiff, which is engaged in the construction of bridges, and several of the members of which are architects and engineers, having learned of this call for tenders by the municipality of Deschambault, sent one of its representatives to the spot to make the necessary calculations and obtain the information to enable it to prepare a tender as asked. This tender was addressed to the council on December 26th, accompanied with plans and specifications for the price and sum of $9,800. These plans and specifications were subsequently at the beginning of January, 1911, approved by the government engineer. The tender of the company plaintiff is the only one which was regularly received by the council up till December 26th, the date on which it was opened, read and communicated to the council at its meeting of December 26th, as is shewn by the minutes of December 26th and 31st.

At the meeting of January 5th, 1911, the council resolved that the bridges should be rebuilt in concrete according to the plans and specifications furnished by the Compagnie des Poutres. The company's representative, however, during this meeting of January 5th, withdrew his tender as well as the plans and specifications, for the reason given in the minutes of the meeting, namely that the council wished to take another tender into consideration. The evidence shews that the consideration by the council of this other tender, which was made by a man named Lachance, was absolutely irregular and unfair to the Compagnie des Poutres, as it was not addressed to the council, but to a councillor, Dr. Mayrand, that Dr. Mayrand had

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only received it on December 27th, after the delay fixed for the receipt of tenders, and that this new tender could have taken communication of the company's tender and consequently have made an offer to obtain the contract.

It appears from the evidence that Lachance's tender was not accompanied with plans and specifications. Notwithstanding the withdrawal of the company's tender, the council, at this meeting of January 5th, resolved to accept it and appointed a committee for the preparation of the contract to be entered into between the corporation and the company. It was further decided to take the company's tender into consideration (sic) again, if it should again become the property of the council. At the meeting of January 7th the company's tender with plans and specifications was again laid before the council, who upon this occasion authorized the mayor to sign the contract with the company, and the mayor did so under reserve of all legal objections.

The notarial contract which was passed on January 7th, 1911, between the company and the corporation in regard to the construction of the eleven bridges, contains, among others, the following statements and stipulations: that the company's tender was the only one made to the council; that it was accepted; that the plans and specifications approved by the parties were deposited at the office of the council; that the company was to deposit in the bank a cheque for $1,000 to guarantee the execution of the work of construction; that the construction price was $9,800; that the work was to be finished by November 1st, 1911, under pain of a penalty of $10 for each day late.

The above contract was followed by municipal elections which changed the majority of the council which was favourable to the construction of the bridges into a hostile majority. Since that date numerous steps were taken and resolutions passed by the municipal council to prevent the building of the bridges and the execution of the contract entered into with the Compagnie des Poutres, the reason urged being that the contract was illegal, as the by-law on which it was based was not in force when the contract was entered into.

Finally an action was taken against the corporation by Mr. Corriveau, advocate, of Quebec and a ratepayer, on March 13th, 1911, under No. 438 to annul the contract. The principal ground of the action was that the by-law of December 5th, which ordered that bridges should be under the charge and at the expense of the municipality had not been promulgated before January 1st, 1911, as required by art. 335 Municipal Code, and that consequently the by-law was not in force when the contract of January 7th, between the company and the corporation for the construction of the bridges was entered into. In this action,

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the Compagnie des Poutres was made mis-en-cause. Both the company and the corporation appeared and declared that they submitted to justice, the company adding that it reserve its recourse against those who might be liable if the contract was annulled. The Court, which we presided over, seeing the evidence and the admission made by the corporation that the conclusions of the action should be maintained, did in fact on May 15th, 1911, declare the demand well founded and adjudged that the by-law of December 5th, had not been promulgated before January 1st, 1911, and that the contract was illegal, as the by-law under which it had been executed was not in force.

The company subsequently instituted the present action against the corporation for the sum of $1,870.75, the damages caused to it from the inexecution and annulling of the contract in the circumstances which we have just related. The present demand comprises three different heads: 1. $393.75 for expenses and disbursements by the company in connection with the preparation of the plans, specifications and tender, also for the cost and value of the plans and specifications at the rate of 3½ per cent upon the whole amount of the contract; 2. $400 odd for the purchase of material and sand in connection with the preliminary work necessary for the construction of the bridges; 3. $980 for the loss of profits to be realized under the contract at the rate of 10 per cent. upon the whole amount of the contract.

First item of $395.75 for plans and estimates.

We may say at the outset, that in regard to these bridges and the obtaining of the contract, the company acted in the best of faith and it is impossible to accuse it of having exercised any undue influence with the ratepayers or the councillors to get its tender accepted. Everything was done on its part according to the ordinary course of business. The council's demand for tenders, with plans and specifications for the construction of the eleven bridges, had every appearance of being regular and properly authorized and being made either in the view of building the bridges under the decision which had already been come to, or for the purpose of obtaining information upon the cost and value of such bridges, or of choosing from various plans and estimates those which presented the greatest assurance of solidity and were most in accord with the rules of the art. The corporation's call for tenders had been made under rather unusual conditions as the tenderer was required to furnish his tender accompanied with plans and specifications. The master does not generally act in this way. He first has plans and specifications prepared by his own architect or engineer and then asks contractors to tender according to these plans and specifications. To conform to the requirements

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of the council it was necessary for the contractor, that is to say the company, to send an architect or engineer to Deschambault so that by examination of the spot and ordinary calculations, it would be enabled to make its plans and specifications. These visits, attendances and calculations and the preparation of the plans and specifications by members of the company obliged it to incur expenses and occasioned a loss of time which under ordinary circumstances would require a remuneration.

The plans and specifications according to the uncontradicted evidence had an appreciable money value, namely, $343 at the rate of 3½ per cent. upon the total contract price. The company, which includes among its members the architect who made the plans, is entitled to the cost of these plans and the fees which the architect could have claimed. Guillouard, Contrat de Louage, vol. 2, p. 341, No. 826, takes this view:—

> Si les plans et projets de l'architecte n'ont pas été exécutés il a droit à des honoraires, ceci n'est pas contesté. Mais ces honoraires doivent-ils être proportionnels à l'importance des travaux qui devaient être exécutés? Nous trouvons équitable d'accorder à l'architecte des honoraires proportionnels, car il a fait les plans avec d'autant plus de soin, il s'y est donné d'autant plus de mal que la construction devait être plus importante. On objecte, qu'il n'encourra pas de responsabilité; cela est vrai, mais il a travaillé comme s'il devait en encourir une, et cela suffit pour justifier l'allocation d'honoraires proportionnels.

The only case, in our opinion, where the owner is not obliged to pay the contractor for the plans he has accepted, is when the works have been done. Guillouard gives the reason for this at No. 882:—

> Si le propriétaire est obligé de payer à l'entrepreneur le prix des constructions, il n'est pas tenu de lui payer, en outre du prix, des honoraires afférents aux plans qu'il aurait faits pour l'exécution des travaux, à moins d'une convention spéciale qui l'y oblige. L'entrepreneur n'a fait les plans que pour obtenir l'entreprise, ou pour l'exécuter après l'avoir obtenue, et il en est suffisamment rémunéré par le bénéfice qu'il fait sur le prix des matériaux et de la main d'œuvre.

It is just because, in the present case, the company is deprived of its profits upon the price of materials or of the labour on account of the inexecution of the contract that it is entitled to recover the cost of the plans. The corporation refuses to pay this amount because it says the by-law of December 5th, 1910, which ordered the construction and maintenance of the bridges by the municipality was not in force and the contract was null. We may ask in vain why and in what manner the question of the contract can prevent the company from recovering the value of the plans and specifications which it furnished with its tender on the demand of the council.

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We repeat, this calling for tenders by the corporation appears regular and valid in every respect. It might be connected with the by-law, it might also be independent of it. As we have said, it might have been made to enable the corporation to obtain information upon the probable cost of the work before it engaged in such an important undertaking. Under the circumstances mentioned above, as the corporation required, solicited and accepted the company's plans and specifications which should pay the value of them.

If the corporation could avoid paying the cost of these plans and specifications, because the by-law of December 5th was not in force, it could equally refuse to pay for the publication of the call for tenders in the papers, or for the cost of these plans and specifications if they had been prepared at the request of its own architect. This pretention cannot be admitted. The corporation has done more; it has accepted the plans and specifications which have a real value; it has kept them in its possession; it has not offered to return them, and it could utilize them if the question of building the bridges again came up. On this first heading we decide in favor of the company and adjudge that it is entitled to claim $393.75 for the value of the plans and specifications as well as the disbursements in connection with and in the time of their preparation.

Second item: about $400.00 for work preliminary to the execution of the contract. This work was done between the seventh and the thirteenth of March, 1911, two months after the contract was passed. It consisted in the purchase and cartage of sand intended for the bridges. The Court considers that this item cannot be allowed the company.

The corporation's responsibility as to the plans and specifications flowed from the presumption that its proceedings were regular and legal and that the powers which the law gives to it were legally exercised. But under the terms of article 697, Municipal Code, this responsibility exists until the contrary is alleged. By these words "the contrary is alleged" the law means until a statement or information is given to the interested party of the legality of the municipal proceedings. But in the present case the allegation to the contrary, that is to say, the illegality of the proceedings of the council was made to the company after the contract, about January 21, on which date the council sent the company a letter from Mr. Corriveau, advocate, giving notice, with his reasons therefor, that the by-law was not in force and that consequently the contract was illegal. The company received this letter. About the same time the company received another explanatory letter in regard to the same matter which was sent to it by the secretary, Naud, and in which the latter informed it that the by-law was not in force.

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Since this date until the 8th March public rumor and information which the company received from other sources informed it that the contract was illegal. These different letters and methods of information constitute the putting in default of the company to desist from its contract and according to the terms of the law constitute an allegation which destroyed the presumption of the legality of the by-law and contract.

After this information was received the company could only exercise their recourse in damages. The work done by the company from the 8th until the 15th March was done at its risk and peril at a date when it knew or ought to know that its contract was null and consequently it is not entitled to claim the cost of it. For these reasons the Court rejects this portion of the demand.

Third item: $980.00 for loss of profits under the contract. The corporation contends that the company is not entitled to these profits nor to any part of them because it was aware that the contract was illegal when it was entered into. The company was not at any time prior to the contract informed that the proceedings of the council with reference to the by-law of December 5, 1910, were irregular or that the by-law was not in force. As we have just said, the company only received an intimation that the contract was illegal on the 21st or 22nd of January. The first opposition which was shewn in regard to the matter was when at the time the contract was signed the mayor declared before the council that he was signing the contract under reserve of all legal objections as appears from the minutes of the meeting of January 7. This is the entry which we find "The contract for the construction of the bridges in reinforced concrete is signed by the mayor under the reserve of all legal objections." If the minutes of the meeting contained all the mayor's objections it may be seen that these objections were general and that the mayor did not give his grounds or reasons for them. Under these circumstances the minutes should be accepted in accordance with their form and tenor and must be preferred to the statements made by the mayor and secretary as witnesses to the effect that the mayor said at the time that the by-law was not in force. The evidence of the mayor is certainly that of an interested person and the secretary's evidence throughout the whole affair is open to suspicion.

It is elementary that if the mayor had wished to avoid trouble both for the municipality and the company, if he had not planned to take the tenderers and the party in favour of the bridges by surprise through this omission in the by-law which was due to the secretary-treasurer, he would have had the sense to do before the contract was passed that which he did afterwards, namely, to obtain legal advice upon the value of the

contract and to communicate this advice to the council so as to put the interested parties on their guard. Such legal advice saying that the by-law was not in force was only obtained on the 19th January. Mr. Corriveau's advice was spontaneous and had not been solicited and although this advice was correct, the same day as it was read before the council the latter still entertained so much doubt upon the validity of the contract that it desired the opinion of other advocates, and it was only on the 25th or 26th January that the advice of Messrs. Dorion and Marchand was received by the council. The company's representative, Mr. Arcand, has testified, and we believe from his attitude and the sincerity of his statements that he spoke the truth, that he did not understand anything about the mayor's objections to the contract and that he always believed the contract was valid as it had been voted for by the majority of the council. Arcand had reason to believe that the discussion which occurred and the objections which were made before the council when the contract was passed were of the kind that always occur in certain municipalities every time the question of an improvement or innovation comes up.

In the present case the corporation made a contract based on a certain by-law regarding the construction of bridges and consequently on the subject over which it had power and jurisdiction. As regards third parties this by-law was presumed to have been adopted with all the inherent formalities both preliminary and subsequent to such a by-law.

We believe that this is a case in which to apply the legal axiom of law, *omnia præsumuntur rite et solemniter esse acta*, an axiom which should especially be followed when the acts of public bodies and officers are concerned. Upon this subject Broom, Legal Maxims, p. 722, says:—

> Where acts are of an official nature, or require the concurrence of official persons, a presumption arises in favour of their due execution. In these cases, the ordinary rule is *omnia præsumuntur rite et solemniter esse acta*. Everything is presumed to be rightly and duly performed until the contrary is shewn.

The author cites a great number of examples analogous to our case. American and English Encyclopedia of Law, vol. 20, p. 1171:—

> Presumption of legality.—A contract formally executed, by city officials, by authority of a municipal council and not necessarily beyond the scope of its powers, will, in the absence of proof to the contrary, be presumed to have been lawfully made.

These legal maxims and this doctrine have been reproduced in our Municipal Code, article 697, which provides that:—

> The promulgation of every municipal by-law is considered to have been sufficiently made, until the contrary is alleged, at the expiration of the delay prescribed for the publication of such by-law.

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As the contract was made according to a by-law which was presumed to be valid and which ordered something, namely, the construction of bridges, over which the council had power and jurisdiction, we are lead to distinguish in a few words between the recourse in damages against a corporation for inexecution of a contract which is void, because it was made under a by-law which was *ultra vires* and the recourse against such a corporation for inexecution of a contract made under a by-law which was irregular and not executory but which regulated and prescribed something within the power and competence of the council. In the first case, namely, contract based on a by-law which is void and *ultra vires*, the doctrine is as a rule, though there are certain exceptions, to deny recourse in damages against a municipality for the reason that everyone is supposed to know what are the powers and public jurisdiction of municipalities. But in the case of a contract made under a by-law relating to subjects over which the corporation has power and authority the recourse in damages is granted.

Article 706, Municipal Code, confirms this view. It says:—

> The corporation, the council whereof passed the by-law so annulled, is alone responsible for the damages and rights of action proceeding from the putting into force of such by-law or of such part of a by-law.

This article is reasonable, it only reproduces the common law and puts corporations under the ordinary responsibility and obligations which everybody incurs who by his act, imprudence, negligence or want of skill causes damage to another. "Corporations," says Brice on *Ultra Vires*, p. 471, "are not created and it is no part of their business to commit torts."

See articles 1070, 1071, 1073 and 1074 C.C.

The authors regard the responsibility of corporations in regard to contracts which are *intra vires* in the following manner:—

Dillon, Municipal Corporations, vol. 2, p. 936, speaks thus:—

> A municipal corporation, as against persons who have dealt with it in good faith and parted with value for its benefit, cannot set up mere irregularities in the exercise of a power conferred; as, for example, its failure to make publication in all of the required newspapers of a resolution involving the expenditure of moneys. This might have the effect to invalidate a local assessment upon the abutter; but as respects a *bonâ fide* contractor with the city, who had expended money for its benefit, in respect of a matter within the scope of its general powers, the contract would not be *ultra vires* in the proper sense of that term; and the city would be estopped to set up as a defence its own irregularities in the exercise of a power clearly granted to it.
>
> A distinction exists, which has often been overlooked, between contracts simply *ultra vires* and those which are illegal because made in violation of a positive provision of a penal statute.

Jones, Negligence of Municipal Corporations, par. 172, says:—

> It is said to be a general rule that a municipal corporation cannot be made liable for negligence in respect to acts which are *ultra vires*.
>
> Par. 173.—This is a rule of great severity.
>
> Par. 174.—If an act done by a municipality is within the general power of the corporation, although it is done in excess or in violation of these powers, the corporation will be held responsible for negligence in respect to it. This principle has been recently asserted where it was claimed that the building of a particular sewer was unlawful and that therefore no action for negligence could be brought in regard to it, and also where an unauthorized bridge was maintained for a considerable period."

Beach, on Public Corporations, Nos. 224, 225, 756; Dillon, Municipal Corporations, No. 936; Tiedeman, Municipal Corporations, No. 169.

See article in 10 R.L.N.S., p. 161:—

> When work is done under a contract void because of some technicality, and not in its substance *ultra vires*, it seems clear that there should be a remedy in quasi-contract for the reasonable value of the benefits conferred.

In order not to overload these notes we may refer specially to Thompson on Corporations, vol. 4, No. 5736, who points out forcibly and logically the difference between contracts which are void and *ultra vires* and contracts which are irregular but which are made within the limits of corporate powers, and he shews the reason why the recourse in damages is refused in the first case, and the possibility of it in the second case.

A corporation according to this generally accepted doctrine is therefore responsible for damages caused to third parties through the inexecution of a contract made under a by-law which was irregular but which it had the power and jurisdiction to make. The company claims $980 for loss of profits which it would have made under its contract, but these profits represent the work, loss of time and inevitable expenses for the execution of the whole contract under these conditions. The company cannot recover the whole amount of profits which it would have realized. This is a case where the Court has a right to exercise a proper discretion in according damages.

The Court has already allowed the company the sum of $393.75 for the preparation of plans and specifications, the cost and value of which were included in the price of the contract. Under these circumstances, adopting the *dictum* of Malouin, J., in *Addie* v. *Town of Thetford Mines*, Que. 39 S.C., at page 420, we allow the company an indemnity of $125 for lost profits.

Finally, the corporation has incidentally raised the objection that the company's recourse could not avail as under its con-

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tract it was obliged to deposit $1,000 as a guarantee for the proper execution of the work and it had not fulfilled this obligation. The call for tenders did not require such a deposit. The contract it is true required it but it did not fix any delay in which the deposit was to be made. The company says rightly that it was not obliged to make this deposit during the preliminary work but it was ready to make it and would have made it as soon as the work on the bridges properly speaking, such as approaches, piling, foundations, etc., was commenced. The company adds that if the deposit was not made it was because the contract was annulled. We think this reply is logical and reasonable.

After having studied the case as carefully as possible we conclude that the corporation should be condemned to pay $518.75 as follows, to wit: $395.75 for the price and value of plans, specifications and disbursements made in regard to the matter and $125 as an indemnity or as damages. For these reasons the Court condemns the corporation of Deschambault to pay the company, plaintiff, the sum of $518.75 with interest from the date of service and costs excepting the costs of the re-hearing on February 5, 1912, and the costs of summoning for this date and the taxation of the witnesses Emile Naud, H. Germain and Oscar Arcand which it will bear. The plaintiff is also condemned to pay $5.00 costs upon the motion of amendment of November 20, 1911.

Judgment for plaintiff.

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Re MOTT.

Alberta Supreme Court. Motion before Stuart, J., in Chambers. February 10, 1912.

1. PARENT AND CHILD (§ IV—40)—RIGHT TO CUSTODY—CHILD IN CANADA —FOREIGN DECREE IN DIVORCE PROCEEDINGS.

The Courts of the Province of Alberta are not bound by that part of a decree divorcing persons married in the United States rendered by a Court in one of the States at the suit of the husband, giving to him the custody of a minor child of the marriage who was born in Canada and had remained in Canada during such divorce proceedings, and the child's father seeking the custody of the child upon a writ of *habeas corpus* is not aided by that decree.

[*Hope* v. *Hope*, 4 DeG. M. & G. 328, 43 Eng. Reports 534, and *Dawson* v. *Jay*, 3 DeG. M. & G. 764, 43 Eng. Reports 300, specially referred to; *Rex* v. *Hamilton*, 17 Can. Crim. Cas. 410, distinguished.]

Statement

MOTION for a writ of *habeas corpus* by the father against the mother from whom he was divorced by the decree of a foreign Court, to produce before the Court their three-year-old child that its custody might be awarded by the Court to the applicant.

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On a ruling being given as to the effect of the foreign divorce, the case was continued to permit of hearing further evidence.

Arthur L. Smith and *J. E. A. McLeod*, for the applicant.

Frank E. Eaton, for the respondent.

STUART, J.:—I adjourned the hearing of this case yesterday in order that I might inquire into the state of the law in regard to whether or not the decree of the California Court which divorced the husband and wife, and also gave the custody of the three children, including the child in question here, to the husband, was binding upon me and settled the question in favour of the husband.

The facts are these: The wife and husband were married in Illinois, and had their domicile there, and two children were born, and they then came to Alberta, bringing with them their children. After they came here, another child, the child in question, was born, while they were living together in Alberta. Then, some time after that, for reasons I yet know nothing about, the wife left the husband, taking the last-mentioned child, the child in question, with her. Then, some time after that, the husband took the two older children with him to California, where his father and mother were living, for the purpose, as he says, of giving them a home and having them cared for. After living there for over a year, he applied in the Courts of California for divorce.

The decree there, as I say, gave the custody, not only of the two children who were with him in California, but also the child in question here, who has always been with its mother, and has never left its mother, who was born here and is a British subject, to the father.

There is no doubt in my mind that I do not need to inquire into the validity of the California divorce at all, because, granting that it was valid in every way, I come to the conclusion that the decision there made as to the custody of the child in question here, is not binding upon me. That was the point which came up yesterday.

The point is, however, settled in the case of *Hope* v. *Hope*, 4 DeG. M. & G. 328, 43 Eng. Reports 534, in the decision of Lord Chancellor Cranworth. In that case a British subject and his wife were living in France, where their children were, and all were domiciled in France, and divorce proceedings were going on in the French Courts, and the French Court had given the interim custody of the children to the mother. An application was made in the English Court of Chancery regarding the custody of the children, although they were not in England at all. Lord Chancellor Cranworth deals with the whole question as to the jurisdiction of the English Court over children so situated. I do not need

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to quote in detail from his decision. He decided that he had authority to deal with the matter, on the ground that they were British subjects, and he made an order requiring the wife to confer with her husband in taking all necessary steps for the purpose of delivering up the children to him with a view to their being brought over and educated in England. She appealed from the Lord Chancellor's order, and successfully resisted her husband's application in the French Court for the delivery of the children, on the ground of the pendency of the appeal. On the matter being again brought before the Lord Chancellor, he made another order upon the wife in the same terms, but requiring compliance within a week. This is a much stronger case than the one before me, because the child here is and always has been within the jurisdiction of this Court.

There are other cases too, such cases as *Dawson* v. *Jay*, 3 DeG. M. & G. 764, 43 Eng. Reports 300, in which the same Lord Chancellor Cranworth refused to transfer the custody of an infant who had been born in New York, but whose father was a British subject according to British law, but also an American citizen, according to American law. He said: "I refuse to order her to be taken back to the United States." But both parents were dead in that case, and it is interesting to see how far the Court did go. All the property of the child was in the United States, and several guardians were appointed in several States; but simply because the child in a sort of clandestine way was taken to England and was technically a British subject, he refused to order it to be taken away from England. It was twelve years old.

The case of *Rex* v. *Hamilton*, 17 Can. Crim. Cas. 410, is distinguishable, because there the child was evidently in Indiana when the order of the Indiana Court was made.

The conclusion is, that I am not bound by the decree of the California Court, and that the father's right can be no stronger by reason of that decree than it is in any case. I think his position as father claiming the custody of his children is far stronger than the position he takes under the California decree. The case will have to go on in the ordinary way as if the father was applying for the custody of his child.

Primâ facie I should say that it is more in the interest of a female child only three years old to be left with its mother. That is, I think the burden of proof must be placed upon the father to shew that the mother is not a proper person to have possession of the child, and that it is not in the interests of the child to be left with her. The case will be enlarged to permit the father to give his evidence if he is in a position to do so.

Ruling accordingly.

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(Decision No. 2.)

Ontario Divisional Court, Falconbridge, C.J.K.B., Britton and Riddell, JJ. June 24, 1912.

1. ESCROW (§ I—1)—AGREEMENT NOT TO REGISTER TRANSFER—PASSING OF TITLE—TRUSTS—MINING SYNDICATE.

Where upon the formation of a mining syndicate to take over the plaintiff's mining claim, a trust company was appointed trustee to hold a transfer of the property but, so as not to affect the rights *inter se* of the parties thereto undertook not to register the transfer, a registration thereof in violation of such agreement will be vacated where no intervening rights are in question; but a re-conveyance of the land will not be ordered merely because of such breach of agreement where the trust company held the title to the property for valuable consideration as against the plaintiff and upon trusts in favour of the members of the syndicate who had become such members and paid for their syndicate shares upon the faith of the title being "vested" in the trust company.

[*Wiley v. Trusts and Guarantee Co.* (No. 1), 3 D.L.R. 295, reversed on the facts; *McKim v. Bixel*, 19 O.L.R. 81, specially referred to.]

2. ESTOPPEL (§ II A—26)—BY DEED—TRANSFER TO TRUSTEE—ADVERTISEMENTS STATING THAT PROPERTY VESTED IN TRUSTEE—UNPAID VENDOR CLAIMING LIEN.

One, who delivered a transfer of property to a trustee as paid for, is estopped by permitting the latter to represent himself in advertisements made for the public to act upon, as being vested with such property from claiming a vendor's lien, as against persons who, on the strength of such advertisements, became members of a syndicate formed to deal with such property and for the benefit of whom the trust was created.

Statement

APPEAL by the defendants from the judgment of TEETZEL, J., *Wiley v. Trusts and Guarantee Co.* (No. 1), 3 D.L.R. 295, 3 O. W.N. 997.

The appeal was allowed unless one of two alternatives suggested by the Court is accepted by the plaintiff.

I. F. Hellmuth, K.C., and *W. J. Elliott*, for the plaintiffs.

J. W. Bain, K.C., for the defendants.

Riddell, J.

RIDDELL, J.:—At about the time of the height of the Cobalt "boom," one Campbell came to Warren, the manager of the Trusts and Guarantee Co., deposited a considerable sum of money with the company and stated to Warren his method of doing business. This was to acquire a Cobalt property, form a syndicate, obtain from or through the syndicate sufficient money to develop the property, and then sell or work it for the benefit of the syndicate. A. M. Wiley (now deceased) and Campbell both told Warren that Campbell had bought certain properties from Wiley and paid for them. It was necessary for Campbell to get the public interested in his scheme and to get money from the public: and this necessitated advertising.

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It was arranged that the Trusts & Guarantee Co. should be trustees for the syndicate, *i.e.*, of course, for all those who were to have an interest in the proceeds of the sale or working of the property. Warren says:—

> The question in my mind was as to whether I would insist upon the transfers being actually executed by Wiley, and recorded before permitting the Trust Company's name to be used in connection with the advertising; and upon an undertaking being given and Mr. E.'s assurance being given that everything was all right, I agreed to let the advertisements go just as if we had the transfers.

The undertaking was as follows:—

> To the Trusts and Guarantee Company, Limited, . . . I, A. M. Wiley, owner of the following properties (setting them out), agree that I hold the same in trust to be conveyed to you for the Cobalt Nipigon Syndicate Registered, and that I will execute proper conveyances vesting the title in you as soon as accurate descriptions can be obtained from Port Arthur, or within ten days from the date hereof.

This was signed, sealed, and delivered by A. M. Wiley, November 22nd, 1906. Mr. E.'s assurance referred to was as follows. Mr. E. drew up the undertaking. Warren did not know Wiley and asked E., "Now Mr. E., do you think this is all right?" and he said "certainly, you can depend on it; it will be all right."

The advertisement will be found in the report of the case of *McKim* v. *Bixel* (1909), 19 O.L.R., at pp. 82, 83—and as will be seen some subscribers were obtained. On November 29th, Warren writes E., the solicitor for Wiley:—

> You were to let me have on Monday last the actual transfers from Mr. Wiley covering particulars of agreement with Mr. Campbell. Will you please see that I have this in possession to-morrow morning.

Such conveyances were urgently called for, as the advertisement which had been very extensively placed, read: "Title to all mineral lands is and will be vested in the Trusts and Guarantee Company, Limited," and an honourable company would see to it that this was done at the earliest possible moment. December 3rd, Mr. E.'s firm reply, saying:—

> Mr. W. wrote to his brother . . . for the original certificates so that a transfer could be drawn to you and deposited with you as arranged . . . I got Mr. W. . . . this morning to write to the registrar for the necessary description. In the meantime I understand that Mr. Campbell has deposited with you a written undertaking from Mr. Wiley to transfer the property.

December 31st, E. writes his client A. M. Wiley, enclosing—

> two separate deeds from yourself to the T. & G. Co. and one transfer under the land title from yourself to the T. & G. Co. This is for the purpose of carrying out your arrangement with Mr. Campbell.

and January 8th, the documents are returned to E. executed, A. M. Wiley saying in the covering letter:—

> Now, I want you to look after the transference of these documents to the Trust Company in such a way that I cannot possibly be tied up and that Campbell must pay me the $30,000 which he promised to do.

February 14th, Warren writes E. again for—

> the transfers to us of the Wiley properties. Will you please let me have them at once in pursuance of the undertaking we have.

February 16th, E. answers that he would be glad to hand over everything he has but—

> I have instructions from Wiley that Campbell has not carried out his arrangement with him, and he asks for a copy of the undertaking.

February 16th, Warren writes—

> unless I receive the documents at once it seems to me that I must take immediate action. I do not know of any obligation on Campbell's part to Wiley. In fact Wiley told me verbally that there were no conditions, and I insisted upon that understanding being put in writing. I have been told by yourself that the only delay was in getting the descriptions.

February 25th, again a formal demand was made for the transfers and March 4th, E. writes Wiley's brothers:—

> I have a letter from the Trust Company insisting on Mr. A. M. Wiley carrying out his undertaking, which he gave to the Trust Company, that is, to transfer certain lands and premises to them . . . I think it would be well in view of your brother's undertaking to hand these documents to the Trust Company with a letter that they are to be held by the Trust Company in escrow until the notes which Mr. Campbell was to give your brother are delivered.

We are not informed how the solicitor conceived such a proceeding to be in accordance with the undertaking he had himself drawn up, and the assurance he had given Warren. March 5th, E. suggests to Warren that he (Warren) should see Campbell and tell him to carry out his part of the agreement, and March 6th, Warren replies:—

> You knew very well that Wiley's undertaking is absolutely unconditional, and I expect you, therefore, to carry it out and also your personal promise to me . . . We have the undertaking which must be carried out.

March 7th, E. writes that if Warren does "not desire to wait till Mr. A. M. Wiley comes to the city," he had better take such proceedings as he may be advised. I venture to think that it would have been better if Warren had then taken proceedings—but he did not. Later on on the same day E. writes Warren's company:—

> In accordance with the writer's conversation with your manager today, we herein enclose you transfers of various properties from Andrew Marks Wiley to your company. The transfers are sent to you on the distinct understanding and agreement that they are not to be registered,

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neither are they to become the property of the Cobalt Nipigon Syndicate until the agreement between the Cobalt Nipigon Syndicate, George C. Campbell and Andrew Marks Wiley is carried out. The consideration for the transfer of these properties has not been paid nor any part of it and Mr. Wiley claims a vendor's lien on the same for it and only deposits them with you in escrow until that is paid. If you cannot hold these transfers on the above conditions kindly return the same to us, as they are left with you on no other conditions.

Warren answered:—

I have to acknowledge the receipt of your two letters of this date. I telephoned you in reply to the first one saying that there was no intention on my part to accuse you personally of any breach of undertaking, but that what I wanted to make clear was that the undertaking to deliver the transfers was absolutely unconditional so far as Wiley and the Trust Company alone were concerned. I suggested that you send the papers with such a letter as you might see fit to write. Since then I have your letter enclosing the transfers. All I can say is that I will hold the transfers unregistered, subject to the terms of the undertaking that I have. I know of no arrangement by which Mr. Wiley is entitled to any consideration for these transfers, but in taking this stand I wish to state that the position of the parties is not to be prejudiced merely by the transfer or possession of the transfers from you to me.

No answer was made to this letter, and it must be taken that E. acquiesced in the terms of this last letter.

Subsequently Warren took advice as to what he should do, in view of the position of the syndicate, the subscribing members, who looked to the Trusts & Guarantee Co. to do what they could to protect them, and counsel advised that the transfers should be registered. Apparently without any reference to Wiley or his solicitor, the company registered the transfers about November, 1907, and thereupon further registered transfers from the company to J. J. Warren (their manager), and from Warren to Stockdale, Stockdale having a miner's license and the transfers being for domestic reasons—then Stockdale executed a declaration of trust in favour of the "Syndicate." May 29th, 1909, Wiley demanded a re-conveyance, claiming that the transfers were held under the terms of E.'s letters of March 7th, 1907. Securing no reply to that letter or to another of June 7th, an action was brought, 2nd October, 1909, by the executors of A. M. Wiley against The Trusts & Guarantee Company, J. J. Warren, Stockdale and Cobalt Nipigon Syndicate—pleadings were noted, closed 3rd December, 1909, against Cobalt Nipigon Syndicate in default of defence—and the case came on for trial before Mr. Justice Teetzel, March 14th, 1912. That learned Judge's conclusions are to be found, 3 D.L.R. 295, 3 O.W.N. 997. The defendants (other than the syndicate) now appeal. It seems too clear for argument that, for valuable consideration, Wiley had undertaken to transfer the pro-

perty to the Trusts and Guarantee Company; that, at a certain stage, he desired to get away from his definite undertaking; that, his solicitor advising a delivery as in escrow, an attempt was made (in and by the letter of the 7th March, 1907), to have the agreement made by Wiley modified in two particulars: (1) the transfers were not to be registered; (2) they were not to become the property of the Syndicate until an agreement between the Syndicate, Campbell, and Wiley should be carried out—and that, while the first change was acceded to by Warren (whether wisely or unwisely), the second was not. He says: "I will hold the transfers unregistered, subject to the terms of the undertaking that I have."

It is argued that the last words of Warren's letter have some significance; but, in view of all the correspondence, all they mean must be, "neither the rights of Wiley nor those of the purchaser Campbell, etc., the parties to the agreement you speak of, will be affected inter se by the transfers reaching our hands."

If these terms were not satisfactory to Wiley or his solicitor, they should have said so: but as I have already said, by their course of conduct, they must be taken to have acquiesced in the terms of this last letter.

Counsel for the Trusts and Guarantee Company seems to have thought that, notwithstanding the express agreement to hold the transfers unregistered, the company, being trustees, were justified in registering them. No authority is cited for that proposition, and counsel before us expressly abandoned the position, and admitted for the purpose of this action that his clients had done wrong. Therefore, however the omission to register might have rendered the company liable to their cestuis que trust, the registration must be vacated and the transfers declared "*unregistered.*"

But, with that done, I cannot see that the company are not entitled to hold the transfers in trust "for the Cobalt Nipigon Syndicate," as set out in the undertaking of the 22nd November, 1906.

What is the "Cobalt Nipigon Syndicate"? Not simply Campbell, Dexter, and White, who, in a proceeding to which the defendants were not party, were held to be "the only members on the 26 November, 1906." See *McKim* v. *Bixel*, 19 O.L.R. 81, at p. 86.

There is no doubt that confusion has arisen by reason of the ambiguity in the name "The Cobalt Nipigon Syndicate." There was a partnership formed by Campbell, Dexter, and White, evidenced by an indenture of the 24th November, 1906 (exhibit 6), to continue for two years under the management of Campbell alone, he to have 80 per cent. of the profits and each of the

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others 10 per cent., and he to have the right, if either of the others should desire to retire, to buy him out for $500. This, if any, must have been the Cobalt Nipigon Syndicate which had dealings with Wiley. Then there is a more extensive "The Cobalt Nipigon Syndicate" provided for by another indenture of the same date (exhibit 5), to be composed of those three and "such other persons as may from time to time be entitled to membership in such Syndicate," the number of memberships to be unlimited, the three persons named to be entitled to 60 per cent. of the profits and the "members" to 40 per cent. "Memberships" were advertised for sale in advertisements referred to by Warren (exhibit 3), and some favourable answers received, with $120 enclosed for a "special membership." See *McKim* v. *Bixel*, 19 O.L.R. 81.

It was this "Syndicate" for which the Trusts and Guarantee Company were to be trustees—a syndicate composed of three persons who were partners and an undetermined number of persons who were not partners, but rather like shareholders in a company or co-owners than members of a partnership. See *McKim* v. *Bixel*, 19 O.L.R. 81, at p. 87.

It is plain that the "memberships," so far as appears, were bought on the advertisement, which states in so many words, "Title to all mineral lands is and will be vested in the Trusts and Guarantee Company Limited," and "The Syndicate already own over 750 acres of valuable mining lands . . ."

It was clearly the duty of the Trusts and Guarantee Company to have this land vested in them before permitting the advertisement to issue—and, having permitted the advertisement to issue before such vesting, the company were clearly right in insisting upon its being done as soon as possible. "Vested" must in this connection mean "effectively and safely vested;" and I cannot understand the action of the company in waiving the right—which, in their position as trustees, may also have been a duty. It is possible that there were considerations which justified them in so doing: but, if so, they do not appear. But we need not consider this matter—the company consent now to be bound by their agreement—this consent and the judgment of the Court based upon it will not prejudice the right of the cestuis que trust or any of them against the trustees for breach of trust, if any damages accrue from such breach of trust, which is not to be anticipated.

It is and was the duty of the Trusts and Guarantee Company to set up and actively assert their claim to the land and conveyances as such trustees—and they also had a legitimate claim for expenses, commission, etc., as such trustees. The judgment obtained against the Cobalt Nipigon Syndicate by default of pleading must apply to the only Cobalt Nipigon Syndicate in existence in November, 1906, when A. M. Wiley is alleged to have

agreed to sell to the "defendant the Cobalt Nipigon Syndicate for the consideration of $30,000" the lands mentioned—and that was the Syndicate formed by the first agreement of the 24th November of the three persons named—the new Syndicate had not been formed with "special members"—these came in in answer to the advertisement published after the sale and after the undertaking. No judgment against that Syndicate can bind the "special members"—they are not partners: *McKim* v. *Birel*, 19 O.L.R. 81.

So long as there are persons for whom the Trusts and Guarantee Company are trustees, I think they are entitled to retain these transfers.

It is claimed that the plaintiffs have a vendor's lien. It is not proved as against the Trusts and Guarantee Company or their cestuis que trust that the amount was not paid—but, waiving that, when the company accepted the trust, it was represented by the owner of the land that the land had been paid for; it is apparent that the company would not have allowed themselves to be represented in public advertisements as vested with the property if the land had not only not been paid for, but even wholly unpaid for. The representation was made that it should be acted upon, the advertisement represented the land as vested in the company—which, of course, implies not subject to a vendor's lien, but paid for; subscriptions were received on this basis by the company from special members, who are now *cestuis que trust* of the company; and I think the vendor is now estopped from setting up that the land is unpaid for—at least as against the "special members." I think, from the evidence of Warren, the position of E. as solicitor for Wiley and the Syndicate, and all the circumstances, that Wiley must have known and did know the whole plan. This, however, applies only to the "special members," who are entitled only to 40 per cent. of the proceeds of the lands—the judgment against the Syndicate will apparently bind the partners in that Syndicate, *i.e.*, those who are entitled to the 60 per cent.

It would seem to be the best disposition to make of the case to direct the sale of the lands; all parties to be at liberty to bid; pay out of the proceeds (1) the costs of the Trusts and Guarantee Company between solicitor and client of action and appeal; (2) any expenses, commissions, etc., to which the said company are entitled; (3) the costs of all parties of the reference; and of the remainder divide 40 per cent. between the "special members" and pay the rest to the plaintiffs. The plaintiffs consenting to this, it should be referred to the Master in Ordinary to sell, tax costs, fix expenses, commission, etc., determine the "special members," and generally to do everything necessary to carry out the judgment—disposing of the costs of the reference as above stated.

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Or, as a business proposition, the plaintiffs may think it wise and profitable to purchase or otherwise acquire the claims and rights of the "special members"—who they are, or at least who they were originally, must be known from the books of the Syndicate and of the defendant company. If this be done, upon the defendants being paid their costs, commission, and expenses as above, the plaintiffs would be entitled to a reconveyance of their property. The Master would fix the costs, etc., and dispose of the costs before him.

If the plaintiffs do not accept either course, I think the appeal should be allowed and the action dismissed, both without costs, but with a declaration that the defendants hold the transfers unregistered according to their agreement.

Appeal allowed.

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RAMSAY v. LUCK et al.

Ontario High Court. Trial before Sutherland, J. April 15, 1912.

1. COSTS (§ II—28)—SCALE—FORECLOSURE ACTION AGAINST PURCHASERS FOR VALUE WITHOUT NOTICE—ERROR IN FILING MORTGAGE IN LAND TITLES OFFICE.

Where an action for the foreclosure of a mortgage against the mortgagor and two purchasers from him who had each bought a third of the land, was dismissed as to the purchasers because they were *bona fide* purchasers for value and without notice of the mortgage, due to the fact that the mortgage had been recorded in the land titles office by an oversight by someone therein, only as against the remaining third of the land and not against the two-thirds so bought, it is proper under such circumstances for the Court to give such purchasers costs as against the plaintiff on the County Court scale and not on the High Court scale which ordinarily they would be entitled to claim.

Statement

ACTION upon a mortgage, for foreclosure, payment, and possession.

The action was dismissed with costs against Lancaster and Wilson; judgment for foreclosure against Luck.

T. A. Gibson, for the plaintiff.

S. H. Bradford, K.C., for the defendant Wilson.

G. Waldron, for the defendant Lancaster.

The defendants Luck were not represented.

Sutherland, J.

SUTHERLAND, J.:—The defendant William Luck was the owner of the east half of lot No. 162 on the southerly side of Merton street, in the township of North Toronto, plan No. M-5, which east half had a frontage on Merton street of 50 feet. On the 12th October, 1909, he executed in favour of the plaintiff (his wife, the defendant Kezie Luck, joining therein to bar dower) a mortgage on the said land for $300 and interest, as therein provided. The 50 feet were divided into three parcels,

each having a frontage on Merton street of 16 feet 8 inches, and on each parcel was a house. The mortgage was, on the 16th October, 1909, recorded in the land titles office in the city of Toronto; but, by oversight, only as against the easterly one-third portion of the said lands. Subsequently, the defendants Lancaster and Wilson, without notice of the said mortgage, respectively purchased and secured certificates of title to the centre one-third and westerly one-third portions thereof. Later on, the plaintiffs learned of the error as to registration; and, by writ of summons dated the 13th August, 1911, commenced this action for foreclosure, upon the said mortgage.

All four defendants were served with the writ, but the defendants Luck did not enter an appearance thereto, and were not present nor represented at the trial.

The plaintiff in his statement of claim asks, as against all defendants, that the mortgage be enforced by foreclosure and for possession of the mortgaged premises, and in addition, for a personal judgment for the principal money and the unpaid interest as against the defendant William Luck. Each of the defendants Lancaster and Wilson pleads that he bought without notice or knowledge of the plaintiff's mortgage. These last-mentioned defendants were examined for discovery, and the plaintiff thereupon learned that they were, as claimed, innocent purchasers for value, without notice. Upon the face of the record, no notice was apparent: and the plaintiff, in initiating the action as against Lancaster and Wilson and making them defendants, was taking a risk that, if he failed to fasten notice upon them, he would be obliged to pay their costs. When, after examination for discovery, he decided to proceed to trial, without discontinuing as against them, he took the risk of the further costs which would thereby be incurred.

He is entitled as against the defendants Luck to the ordinary judgment for foreclosure, limited to the easterly one-third of the 50 feet in question, and to a personal judgment against the defendant William Luck for $300 principal moneys and interest from the 12th October, 1912, according to the terms of the mortgage; and I order and adjudge accordingly.

The plaintiff will have his costs as against the defendant William Luck on the County Court scale: see 9 Edw. VII. ch. 28, sec. 21, sub-sec. (*e*).

The action will be dismissed with costs as against the defendants Lancaster and Wilson.

At the trial, counsel for these defendants offered, in case I should be of opinion, under the circumstances, that they might well be content with costs on the County Court scale only, not to press for costs on the High Court scale, which ordinarily they would be entitled to claim. I think, having regard to the facts,

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it will be appropriate to give them costs throughout as against the plaintiff on the County Court scale; and I order and direct accordingly.

The oversight having occurred in the land titles office, the plaintiff will be left to seek such relief as he may be reasonably entitled to, if any, out of the assurance fund under the Act.

Judgment accordingly.

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June 8.

FREEMAN v. BANK OF MONTREAL.

Ontario High Court. Trial before Middleton, J. June 8, 1912.

1. BANKS (§ IV A—60)—PAYMENT OF INFANT'S CHEQUE—RECOVERY BACK OF MONEY PAID.

A cheque drawn by an infant upon a bank account standing in his name is a good discharge to the bank which pays it, and the amount of a cheque so paid cannot be recovered by the infant from the bank.

[Dicta in *Earl of Buckinghamshire* v. *Drury*, 2 Eden, 60, at p. 71; *Ex p. Brocklebank*, 6 Ch. D. 358, at p. 359; and *Barnaby* v. *Equitable Reversionary Interest Society*, 28 Ch. D. 416, at p. 424, approved and applied; *Overton* v. *Bannister*, 3 Hare 503; and *Valentini* v. *Canali*, 24 Q.B.D. 166, followed.]

2. BANKS (§ IV A—60)—PAYMENT OF INFANT'S CHEQUE—RELEASE OF BANK—R.S.C. 1906, CH. 119, SECS. 47, 48 AND 165.

The effect of sections 47, 48 and 165 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, is to constitute a cheque drawn by an infant upon an account standing in his name a complete discharge to the bank which pays it.

3. INFANTS (§ I D 2—22*a*)—CHEQUES DRAWN BY INFANT—OVER $500—LIABILITY OF BANK—R.S.C. 1906, CH. 29, SEC. 95.

Section 95 of the Bank Act, R.S.C. 1906, ch. 29, does not impose upon a bank in Ontario, which has more than $500 on deposit in the name of an infant, without knowledge of his infancy, a liability to repay to the infant the amount of a cheque for over $500 drawn by him upon his account.

4. ESTOPPEL (§ III G—87*b*)—LACHES OF INFANT—FAILURE TO BRING ACTION TO RECOVER AMOUNT OF CHEQUE FOR OVER A YEAR—MISTAKE AS TO HIS AGE.

Where a bank has more than $500 on deposit in the name of an infant, and has paid a cheque for over $500 drawn by him upon his account during his infancy, and the infant has made no objection to such payment for more than a year and a half after coming of age, he will be precluded by his laches from recovering the amount of the cheque from the bank, notwithstanding that he believed himself to be a year younger than he was.

Statement

ACTION brought by one John W. Freeman to recover from the defendants the sum of $1,300, being a portion of a sum of $1,800 deposited by the plaintiff to his credit in the defendants' branch bank at Deseronto, and withdrawn by him from the bank during his infancy.

The action was dismissed.

W. G. Wilson, for the plaintiff.

W. B. Northrup, K.C., for the defendants.

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June 8, 1912. MIDDLETON, J.:—The sum of $1,020.42 was deposited on the 8th September, 1905. This sum was the share of the plaintiff in the estate of his deceased grandfather. His father, John Freeman, was executor of the estate; and, upon realisation, paid this money to the plaintiff, who thereupon deposited it in the bank to his own credit. The sum of $774.76 was deposited in the bank on the 15th September, 1905, and was the amount of money standing to the plaintiff's credit in the post office savings bank, and withdrawn by him from that bank, in the name of John Freeman. This amount represented $100, the proceeds of the sale of certain sheep given to the plaintiff by his grandfather, with whom he at one time resided, and moneys saved by the plaintiff from wages paid to him by his father.

The plaintiff's father was at one time supposed to be a successful business man. He carried on business first as a grocer in Deseronto and later as an hotel-keeper. The plaintiff entered his father's employment when about twelve years of age, and assisted first in the grocery business and afterwards as bartender. He lived at home, was charged nothing for his board or lodging, and received wages, a substantial portion of which went into the post office savings bank, and then into the defendants' bank.

The hotel premises were at that time under mortgage to one John McCullough. In April, 1906, an agreement was come to between the plaintiff and his father by which the plaintiff agreed to lend his father $1,800, to be paid on account of the mortgage upon the hotel; and on the 20th April, 1906, the plaintiff signed a cheque in favour of McCullough for this amount. This cheque was afterwards deposited to the credit of McCullough in the defendant bank, and in due course was paid out upon McCullough's cheque.

The father continued to carry on the hotel business until shortly before the 22nd August, 1910, when he left Ontario on account of domestic and financial trouble. Almost immediately after his departure, the plaintiff consulted his present solicitor, who on the 22nd August, 1910, wrote a letter to the bank demanding payment of $1,300 and interest, upon the theory that the receipt of the $1,800 from a minor was a breach of the Bank Act, and that the payment to the minor of anything over $500 was void against the plaintiff, who, by reason of his minority, claimed to avoid the contract. Without waiting for a reply, the solicitors issued the writ in this action on the 23rd August.

The plaintiff was born on the 23rd December, 1887, and so came of age on the 23rd December, 1908; more than a year and a half before the bringing of this action. He asserts that he understood until recently that he was born on the 23rd December, 1888, and so would not be of age until the 23rd December, 1909

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—a little over six months before the bringing of the action. He does not say that his conduct with reference to the bank and his attempt to repudiate were in any way influenced by this misunderstanding; but he does rely upon his mistake as an answer to the suggestion that his laches should be treated as precluding him from now repudiating what he did in his minority.

About the time the father left Ontario, the mortgage upon the property was foreclosed, and the whereabouts of the father was not for some time ascertained. It is admitted that he is now absolutely worthless.

In Grant's Treatise on the Law relating to Bankers, 6th ed. (1910), p. 31, it is said: "The relations between a bank and an infant customer have not yet been the subject of judicial decision, and involve questions of great nicety." After the examination of some authorities, he concludes thus: "It is, therefore, submitted that the law is that if an infant draws a cheque in his own favour, and receives the money, the banker could clearly not be called upon to pay the infant the money a second time. As regards cheques in favour of third parties, the true relation seems to be based on the principle that an infant may do by an agent any act that he can legally do himself."

In Sir John R. Paget's article on Bankers and Banking, in Halsbury's Laws of England, vol. 1, p. 587, it is stated: "A current account may be opened with an infant, so long as it is not allowed to be overdrawn; for an infant may be a creditor. A cheque drawn by an infant entitles the holder to receive payment, and so constitutes a discharge. An infant cannot claim again money paid out to him or others on his cheques."

These expressions of opinion are based upon such statements as that of Pearson, J., in *Burnaby* v. *Equitable Reversionary Interest Society* (1885), 28 Ch.D. 416, 424, where he says: "The disability of infancy goes no farther than is necessary for the protection of the infant." And that of Lord Mansfield in *Earl* v. *Buckinghamshire* v. *Drury* (1761), 2 Eden 60, 71: "Infancy never authorises fraud . . . If an infant . . . receives rents, he cannot demand them again when of age." And that of James, L.J., in *Ex p. Brocklebank* (1877), 6 Ch.D. 358, 359: "Cannot an infant give a receipt for wages or salary due to him in respect of his personal labour?"

These statements, it is true, are *dicta;* but they are *dicta* of great weight, and are quite in accord with the general principles governing infants.

In *Overton* v. *Banister* (1844), 3 Hare 503, an infant nineteen years of age had executed a release. This was held to be a good discharge to the trustee for the sum actually paid, but not to be a bar to a suit to recover a further sum alleged to be due.

In *Valentini* v. *Canali* (1889), 24 Q.B.D. 166, Lord Coleridge, C.J.—with whose judgment Bowen, L.J., concurred—in dismissing an action brought by an infant to recover moneys paid by way of rent for a furnished house which he had used and occupied, stated that the infant's claim "would involve a violation of natural justice. When an infant has paid for something and has consumed or used it, it is contrary to natural justice that he should recover back the money which he has paid."

It is clear that, when the bank became indebted to the infant Freeman with respect to his deposit, the mere fact of his infancy would have been no answer to an action brought by him to recover the money. As put by James, L.J., in the case already referred to, 6 Ch.D. at p. 360: "A man cannot be allowed to escape from the payment of a debt because the person to whom it is due happens to be an infant. He cannot be permitted to say, 'I will cheat my creditor because he is an infant.'"

It is a mere accident that, by the Rules of Practice, in an action for the recovery of a debt due to an infant, the judgment would require the money to be paid into Court for his benefit. That provision does not in any way alter the effect of the contract to repay implied upon the making of the deposit.

The contract was one beneficial to the infant. He was the custodian of his own money, and the agreement merely made the bank a temporary custodian of his funds during his will. The bank's obligation was to hand back the money to its customer or pay it to his order. Nothing in this was detrimental in any way to the interest of the infant.

But, apart from this, I think that the provisions of sec. 48 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, afford a complete defence, although this operation of the section may not have been foreseen by the draftsman of the Act. Section 47 provides that "capacity to incur liability as a party to a bill is coextensive with capacity to contract." But sec. 48 provides that "where a bill is drawn or endorsed by an infant . . . the drawing or endorsement entitles the holder to receive payment of the bill . . ."

This provision applies to a cheque (sec. 165): and, substituting the word "cheque" for "bill," the effect is: "A cheque drawn by an infant entitles the holder to receive payment thereof." If McCullough was entitled to receive payment, then the payment must operate to discharge the bank.

The plaintiff's counsel based his argument to a great extent upon the provisions of sec. 95 of the Bank Act, R.S.C. 1906, ch. 29; and I have postponed its consideration because it can better be dealt with in the light of the law relating to infants' contracts. That section provides: "The bank may . . . (*a*)

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receive deposits from any person whomsoever . . . whether such person is qualified by law to enter into ordinary contracts or not; and, (*b*) from time to time repay any or all of the principal thereof, . . . 3. If the person making any such deposit could not, under the law of the Province where the deposit is made, deposit and withdraw money in or from the bank without this section, the total amount to be received from such person on deposit shall not, at any time, exceed the sum of five hundred dollars."

So far as I know, no case has arisen under this section. The plaintiff's counsel assumes that the effect of it is to make not only the receipt from but the repayment to an infant of any sum exceeding $500 unlawful; and from this he argues that because $1,800 was received unlawfully, and $500 only could be paid lawfully, he is now entitled to demand payment of $1,300, the disability having ceased.

In the first place, it is to be observed that there is no restriction upon repayment. The restriction is upon the amount of deposit; and if, as a matter of policy, the Legislature requires an infant's account to be kept under $500, and the bank, in ignorance of the fact that the depositor is an infant, receives a sum exceeding this limitation, it then becomes the bank's duty immediately to repay the excess to the infant, on learning of his minority. I cannot find in this section any sanction for the theory upon which the action is brought.

But, as said, I do not think that there is any "law of the Province" which prevents an infant from depositing money in and withdrawing it from the bank, even assuming that the expression "law of the Province" is not to be confined to an express statutory provision.

If an infant cannot deposit money in and withdraw it from a bank, possibly he would be unable to deposit his money with an innkeeper for safe-keeping; or, if he did deposit it, according to the plaintiff's theory the only safe course for the innkeeper would be to wait till suit and then to pay the money into Court.

Upon another ground, I think, the plaintiff fails. The action is not brought until more than a year and a half after the infant attained his majority. The money withdrawn from the bank was used by him for his father's benefit, and applied in reduction of the mortgage on the father's hotel. Before making any claim, he waited until the mortgage on the hotel had been foreclosed and the father had absconded. If he intended to repudiate what he had done during his minority, I think that, under the circumstances, he ought to have acted with greater promptness.

In answer to this, the plaintiff suggests that he had been misled by his mother as to the actual date of his birth, and that

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he supposed that he was a year younger than it now turns out that he is.

I do not think that this affords him any excuse. His competency depends upon his age, not upon what he thinks his age is. If the defendants had misled him, they might be estopped. The fact that his mother misled him—if, indeed, she did—is quite immaterial.

I find as a fact that the defendants acted throughout honestly, without any knowledge of the plaintiff's infancy, and that there is nothing in his appearance to indicate infancy or to provoke inquiry. If it had not been for the fact that the mother's statement was not contradicted, I should have thought from the plaintiff's appearance that he was older than the mother states. I do not at all credit his half-hearted statement that he was coerced into making the loan to his father. I think the true situation was, that, at that time, he had confidence in the business in which he was his father's right-hand-man, and thought that the interest of his father and himself was identical.

The action will be dismissed with costs.

Action dismissed.

MacMAHON v. RAILWAY PASSENGERS ASSURANCE CO.

(Decision No. 3.)

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May 21.

Ontario High Court, Riddell, J., in Chambers. May 21, 1912.

1. DISCOVERY AND INSPECTION (§ I—2)—COMPELLING ANSWERING OF QUESTION—PRIVILEGE—CONTRADICTION OF AFFIDAVIT ON PRODUCTION.

Information which would otherwise be compellable on an examination for discovery does not become privileged because an affidavit on production has been made, and the information sought would contradict the affidavit, or form a basis for a motion for a better affidavit.

2. DISCOVERY AND INSPECTION (§ IV—20)—EXAMINATION OF PLAINTIFF—ANSWERING QUESTIONS IN REFERENCE TO DOCUMENTS NOT REFERRED TO IN AFFIDAVIT ON PRODUCTION.

In an action upon an accident insurance policy upon the life of the plaintiff's mother, where one of the defences is misrepresentation as to the age of the deceased, the plaintiff, on his examination for discovery, must answer questions as to the marriage certificate of his parents, which may be material in determining the age of the deceased, notwithstanding the fact that no mention of any marriage certificate has been made in his affidavit on production.

[*Standard Trading Co.* v. *Seybold*, 1 O.W.R. 650, discussed, and dictum of Meredith, C.J., therein dissented from; *Dryden* v. *Smith*, 17 P.R. 500, distinguished.]

Statement

APPEAL by plaintiff from an order of the Master in Chambers requiring him to make further answer upon an examination for discovery.

The judgment appealed from, delivered by Mr. J. S. Cartwright, Master in Chambers, on May 6, 1912, was as follows:—

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The Master.

May 6, 1912. THE MASTER:—In this action for the amount of a death claim upon an accident insurance policy, one of the defences is, that the age of the assured was incorrectly given. On examination of the plaintiff for discovery, he was interrogated on this point, and was asked to produce the marriage certificate of his mother, the assured; no such document was mentioned in the plaintiff's affidavit on production, and his counsel objected to these questions as being an attempt to cross-examine on the affidavit on production. The plaintiff did not say whether he had it or not, but stated that he was informed that the marriage took place at Belleville, Ontario, in what year he could not say. (This would seem to imply that the certificate was not in his possession.) He stated facts as to his own birth and that of his older brother which would agree with 1864 as the date of the marriage. He further stated that he had no record of his mother's age, and that all his inquiries on the point had been fruitless. He was then asked again as to the marriage certificate, and the objection of his counsel was again made and sustained by the examiner (questions 23 and 24).

The defendants now move for an order to have the questions answered, and that the plaintiff produce the marriage certificate therein referred to, and make a further affidavit on production.

It is to be observed that the plaintiff has never admitted that he had at any time any marriage certificate of his parents. It is, therefore, clear that the motion, so far as it asks for a further affidavit, is made too soon.

The first point to be decided now is, whether the plaintiff should state: (1) whether he had such certificate (question 9), though this is not material, as (question 22) he was again asked if he had the certificate, and at once answered and without objection by his counsel, "No, I have not." He was then asked (question 23), "Is it in your solicitors' possession?" This was not answered, and he was then asked (question 24), "Have you seen a marriage certificate?" This he declined to answer, on the advice of counsel, and the objection was sustained by the examiner.

Counsel for the plaintiff relied on the decision of the Divisional Court in *Standard Trading Co.* v. *Seybold* (1902), 1 O.W.R. 650, and especially on the words (p. 651): "The opposite party may not indirectly, by means of an examination for discovery, do that which he may not do directly—cross-examine upon an affidavit on production." But this must be read with what precedes. The case is not found in the Ontario Law Reports, and the facts are not given in detail. It would seem, however, that the defendant was asked on discovery if he had executed a certain document, referred to as exhibit 6. Then the judgment proceeds: "So far from there being any admission by the defendant that he had ever had in his possession or then had such a document, according to

his recollection as then stated he never signed any such document." The next paragraph recognises admissions that he had other documents as a ground for a further affidavit; and, in my reading of this case, it only says that the usual rule as to when a further affidavit can be required is to be strictly followed, but not so as to debar the examining party from doing what was done in that case. Had the defendant admitted that he had executed exhibit 6, or had had it in his possession at any time, he might have been required to make a further affidavit.

I was always under the impression that an examination for discovery was a very usual way to obtain a further affidavit. The insufficiency of the previous affidavit is then brought to light—arising very often from oversight or forgetfulness of the deponent or from a misapprehension of himself or his solicitor as to the relevancy of documents other then those produced.

The counsel for the defendants stated that he was willing to accept the statement of the plaintiff's solicitors as to whether there was a marriage certificate in existence, and whether the plaintiff had seen it, or had had it in his possession. This he is entitled to, on the ground that the true age of the assured is in issue, and the production of the certificate might enable the defendants to obtain conclusive evidence on this point. (See *Attorney-General* v. *Gaskill* (1882), 20 Ch.D. 519, 528, cited in Bray on Discovery, p. 112.) This is the more important as the plaintiff admits that a month before her death his mother said (question 199 *et seq.*), "I am about sixty-four." One of the conditions of the policy is, that the assured was, on the 11th April, 1911, not sixty-two.

If the solicitors cannot give this information, there must be further examination before trial. Success having been divided, the costs of this motion will be in the cause.

The plaintiff appealed from the order of the Master in Chambers.

The appeal was dismissed.

H. E. Rose, K.C., for the plaintiff.

Shirley Denison, K.C., for the defendants.

Riddell, J.

May 21, 1912. Riddell, J.:—This is an appeal from an order of the Master in Chambers directing the plaintiff to answer certain questions which he refused to answer upon his examination for discovery.

The action is upon an accident insurance policy—one of the defences is misrepresentation as to age. Upon the examination for discovery, the plaintiff refused to say whether the marriage certificate of the deceased (which would or might, as it is admitted, assist in proving the age of the deceased) was in the possession of his solicitors.

The ground of the objection is, that the plaintiff had already made an affidavit on production in which he did not mention this

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document; and it is contended on his behalf that the question which he objected to answer was an indirect cross-examination upon that affidavit.

I may say at once that I cannot understand the refusal of the plaintiff or his solicitors to make full disclosure of this document if it exists—if the claim is an honest one. But that does not disentitle him to take full advantage of the law if it is as he contends.

The practice, which never obtained in England, of cross-examining on an affidavit on production was introduced into the Upper Canada Chancery practice shortly after the reorganisation of the Court of Chancery in 1849, by 12 Vict. (Can.) ch. 64. Before that time, the Court of Chancery had been as at first constituted in 1837 by 7 Wm. IV. ch. 2, with a Vice-Chancellor—but thereafter the Court was equipped with a Chancellor and two Vice-Chancellors. Before this, the English Orders passed before March, 1837—the date of the Act 7 Wm. IV. ch. 2—and a few orders passed by the Upper Canada Court of Chancery—were in force. In 1850 (7th May), new orders were issued by the Upper Canada Court of Chancery, amongst them No. 50: "Any party to a suit may be examined as a witness by the party adverse in point of interest . . . without any special order for that purpose . . ." This provision was continued by the Chancery General Orders of 1853, O. 22, sec. 1 (see 3 Gr. at p. 28), and became in the Chancery General Orders of 1868 Chancery General Order 138.

In 1852, this was considered to justify cross-examination on an affidavit of documents: *Nicholl* v. *Elliott* (1852), 3 Gr. 536, at p. 545, *per* Blake, C.: "Where the affidavit fails to furnish the discovery to which the plaintiff may be entitled, it will be competent for him, of course, to cause the defendant to be examined *viva voce* . . ."

And in 1877, under the Chancery General Orders of 1868, Spragge, C., in *Dobson* v. *Dobson* (1877), 7 P.R. 256, following the former case, held that an examination upon the affidavit of documents was warranted by the General Order. The Chancellor points out the danger of two examinations, one for discovery, one upon the affidavit, but says (p. 258): "The question of costs . . . the Court might deal with in the case of two examinations without any reason for it . . ."

This overruled *Paxton* v. *Jones* (1873), 6 P.R. 135, in which Mr. Holmested (Referee) had held that Order 138 did not justify cross-examination on an affidavit on production, and pointed out that General Order 268 did not refer to affidavits on production: "Any person having made an affidavit to be used or which shall be used on any motion, petition, or other proceeding before the Court, shall be bound to attend for the purpose of being cross-examined . . ."—this was O. 40, sec. 7, of the Orders of 1853.

In the Rules of 1888 such a cross-examination was specially provided for. Con. Rule 512 was: "The deponent in every affidavit on production shall be subject to cross-examination;" but this was abrogated on the 23rd June, 1894, by Rule 1345, which in 1897 became Con. Rule 490: "A person who has made an affidavit to be used in any action or proceeding, other than on production of documents, may be cross-examined thereon— still in force.

No doubt, the exception of the affidavit on production from liability to question by cross-examination thereon, was due to a desire to prevent two examinations and so save costs. See the remarks of the Chancellor in *Dobson* v. *Dobson*, 7 P.R. at p. 258, cited above.

It never was intended to prevent any examination being had or questions asked which could be had or asked otherwise than on an examination on such an affidavit—that it prevented cross-examination on an affidavit on production is beyond question.

In *Dryden* v. *Smith* (1897), 17 P.R. 500, an attempt was made to get around the Rule by taking out an appointment for examination of the plaintiff upon a pending motion made by the defendant for a better affidavit on production from the plaintiff. Mr. Cartwright, sitting for the Master in Chambers, set this aside, and his judgment was affirmed on appeal by Moss, J.A. The learned Judge (now Sir Charles Moss, C.J.O.) pointed out (p. 504): "The usual practice of examining the plaintiff for discovery has not as yet been adopted in this case." And (p. 505): "This appears to me to be in substance an attempt to cross-examine the plaintiff upon his affidavit on production, under cover of a motion which, if made at all, should follow and be based upon the outcome of the means usually adopted under the Rules and practice for obtaining from a party information and discovery as to documents in his possession or power beyond that already furnished by the affidavit on production."

So far is this from deciding that the opposite party cannot obtain, by an examination for discovery, information as to documents supposed to have been left out of the affidavit—that it (as it seems to me) certainly approves of the "usual practice of examining . . . for discovery," and of an application for a better affidavit based upon the outcome of following such practice.

In *Standard Trading Co.* v. *Seybold*, 1 O.W.R. 650, the defendant had filed an affidavit on production sufficient in form; he was then examined for discovery and asked whether he had signed a document, exhibit 6, then produced to him. He said that, according to his recollection, he had never signed any such document. The plaintiffs then "deliberately closed their examination," and moved for an order: (1) that the defendant should file a further and better affidavit on production; and (2) that he should attend again for further examination. The Local Master

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at Ottawa refused to make the order; on appeal, the Chancellor reversed the decision and made the order asked for; the defendant then appealed to a Divisional Court, which Court allowed the appeal. The grounds—wholly sufficient grounds, as must be admitted—are these. As to making a better affidavit, the deponent did not admit that he had or ever had had the document—as to the other part of the motion, the plaintiffs had deliberately closed their case. In the report in 1 O.W.R., at p. 651, the Chief Justice of the Common Pleas, who gave the judgment of the Court, is represented as saying: "As was determined by Mr. Justice Moss in one of the cases referred to (*Dryden* v. *Smith*, 17 P.R. 500, 17 Occ. N. 262), the opposite party may not indirectly, by means of an examination for discovery, do that which he may not do directly—cross-examine upon an affidavit on production." It is quite plain that this is *obiter dictum*, and not a decision—moreover, it would seem to be either a misprint or due to inadvertence: Mr. Justice Moss was not dealing with an examination for discovery at all, but an examination for use upon a motion for a better affidavit. But, whether *dictum* or decision, inadvertence or not, it is far from deciding that information which would otherwise be compellable on an examination for discovery becomes privileged if and when an affidavit on production is made, and the information sought would contradict the affidavit—or, if not contradict, form a basis for a motion for a better affidavit. It is admitted that such a document could be called for at the trial—and also (unless the affidavit on production interfered) at the examination for discovery.

I think the appeal should be dismissed with costs to the defendants in any event.

I must again express my astonishment at the attitude of the plaintiff, if his claim is honest.

Appeal dismissed.

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June 7.

WOOD v. GRAND VALLEY R. CO.

Ontario High Court. Trial before Middleton, J. June 7, 1912.

1. CORPORATIONS AND COMPANIES (§ IV G 2—111)—POWERS OF PRESIDENT—CONTRACT SIGNED BY CORPORATE NAME FOLLOWED BY SIGNATURE OF PRESIDENT AS SUCH.

The name of an incorporated company at the foot of an agreement, followed, as part of the same signature, by the name of its president and the word "president" is the signature of the company and not of the president personally.

2. CORPORATIONS AND COMPANIES (§ IV G 2—111)—LIABILITY OF PRESIDENT ON AGREEMENT EXPRESSLY ENTERED INTO ON HIS OWN BEHALF AND THAT OF THE COMPANY—SIGNATURE OF COMPANY.

Where by an agreement which is in writing but which it would have been competent to the parties to make without any writing, the president of an incorporated company enters into an undertaking expressly upon his own behalf and upon behalf of the company, but signs the agreement in the name of the company only, the written document

will be regarded merely as a record of the agreement and not as the agreement itself, and the president will be held personally bound by his undertaking.

3. CONTRACTS (§ VI A—411)—RECOVERY BACK OF MONEY PAID—NON-PERFORMANCE OF A PROMISE—DAMAGES.

Money cannot be ordered to be repaid as upon a failure of consideration, where the failure is the non-performance of a promise, the only remedy is damages for the breach of the promise.

4. DAMAGES (§ I—3*a*)—SUBSTANTIAL AMOUNT—UNCERTAINTY IN ASSESSING.

Substantial damages may be awarded in spite of the fact that some speculation and uncertainty is necessarily involved in the assessment thereof.

[*Chaplin* v. *Hicks*, [1911] 2 K.B. 786, followed.]

Statement

ACTION by a number of manufacturers and merchants, carrying on business at the village of St. George, against the railway company and A. J. Pattison, formerly president of the railway company, to recover damages from the defendants for breach of contract to construct an addition to their line of railway so as to connect the village of St. George with the Canadian Pacific Railway at Galt; for repayment of $10,000 paid by the plaintiffs for bonds of the railway company; and for other relief.

Judgment was given for the plaintiff and costs subject to condition imposed by the Court.

G. F. Shepley, K.C., and *A. M. Harley*, for the plaintiffs.
S. C. Smoke, K.C., for the defendant company.
C. J. Holman, K.C., for the defendant Pattison.

Middleton, J.

June 7, 1912. MIDDLETON, J.:—The plaintiffs are a number of merchants and manufacturers carrying on business at St. George, a village situated about half way between Brantford and Galt. At the time of the occurrences giving rise to this action, and down to the present time, the village of St. George was somewhat unfavourably located from the standpoint of the manufacturer. The Grand Trunk Railway has a station named St. George, but it is between one and two miles from the village, and no accommodation is afforded to industries by any spur line or industrial sidings or switches. The Grand Valley Railway, running from Brantford to Galt, follows a semi-circular route along the valley of the Grand River, passing some six miles south of St. George. A branch line runs northward at Blue Lake, some two miles, terminating four miles south of the village.

In 1906, Mr. Pattison was the president of the Grand Valley Railway Company, its largest individual stockholder, and very much interested in the success of the undertaking. He conceived the idea that a continuation of the road from Blue Lake to St. George would not only be of great advantage to the industries of that village, but that the interests of his road would be substantially advanced, as a very considerable amount of freight might

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be diverted from the Grand Trunk by affording convenient access to the different industries, and the freight could then be carried to Galt, where transshipping arrangements might be made with the Canadian Pacific Railway Company.

With this in view, he visited St. George, and convened a public meeting of those most likely to be interested in the proposed arrangement; and, after explaining what was proposed, he solicited financial assistance, to take the shape of the purchase of bonds that would be issued by the railway company to aid in the construction of the four miles necessary for this new undertaking.

Like all promoters, Mr. Pattison was sanguine, and he seems to have imparted some of his enthusiasm to the plaintiffs. The Grand Valley Railway Company was well-known; its financial position was not regarded as satisfactory; and, before parting with their money, the plaintiffs insisted on Mr. Pattison shewing his faith in the company under his control by himself undertaking to be responsible for the carrying out of the promises he was ready to make on its behalf.

There is a conflict of evidence as to Mr. Pattison's attitude. His recollection is, that he was to undertake nothing save in his representative capacity; but I think his recollection is at fault, and that it was his intention, as well as the intention of the plaintiffs, that he should be personally bound.

Upon the faith of Mr. Pattison's personal guarantee, the plaintiffs agreed to purchase bonds of the road to the extent of $10,000. These bonds were not regarded as being of any great value, and were not sought as an investment. What the plaintiffs desired, and what Mr. Pattison promised—both in his own name and in the name of the railway company—was the construction of the line which would give them a means of handling freight independently of the Grand Trunk; the accommodation afforded by that company being, as already said, regarded as quite inadequate and unsatisfactory.

Mr. Pattison undertook to reduce the arrangement to writing, and he prepared a short memorandum—produced at the trial as exhibit No. 2—under date of the 6th June. This stated that the subscription of Mr. ———— for ———— bonds is received subject to the establishment of freight connection with the Canadian Pacific Railway at Galt, and is to be cancelled if freight connection and satisfactory tariff rates are not arranged. This memorandum was signed by the Grand Valley Railway Company, and was to be delivered to each individual subscriber whose subscription would form part of the $10,000.

When this document was submitted as embodying the arrangement made, it was at once repudiated. Mr. Pattison's

attitude then was: "If you do not like the draft that I propose, prepare one to suit yourselves." Mr. Wood was selected as the draftsman, and prepared the document exhibit No. 3. This was afterwards read over by all concerned, was deemed to be satisfactory, and was executed by Mr. Pattison, who signs thus: "The Grand Valley Railway Company, A. J. Pattison, President."

Upon the faith of this document (dated the 29th June, 1906), individual subscriptions for bonds—some of which bear an earlier date, but were until then held in escrow—were handed over, and new subscriptions were made for an amount necessary to cover the shortage, so that the total would reach the required $10,000. A joint note was executed by the subscribers and discounted; the proceeds went to the credit of the railway company; and the bonds were allotted and distributed. Some of the signatories to this note ultimately proved unable to pay. The plaintiffs paid the whole note, and between them became entitled to the whole $10,000 of bonds.

The company readily assimilated the $10,000, but did not make any serious endeavour to construct the four miles of road: merely grading a short distance.

At one stage of the trial, some difficulty was suggested by reason of the bonds having been transferred by the Northern Securities Limited; but Mr. Pattison made it quite plain that the bonds were the bonds of the railway company, although held by the Northern Securities Limited, a concern of which he was also president.

Upon the pleadings, the company disputed all liability for the transaction; but, when it was made to appear that the money had gone to the company, and when Mr. Pattison stated that all he had done was done with the sanction not only of the entire directorate, but with the sanction and approval of all the shareholders of the company, Mr. Smoke admitted that the company was not in a position to repudiate the transaction.

The question of difficulty is, whether, on the agreement of the 29th June, Mr. Pattison assumed any personal liability.

In the first place, much reliance is placed upon the fact that Mr. Pattison did not sign this document individually; he signed it merely as president of the railway company.

I quite agree with Mr. Shepley that the addition of the word "president" would not derogate from Mr. Pattison's personal liability if the signature had been simply "A. J. Pattison, President;" but I cannot follow him when he contends that the signature in question is Mr. Pattison's signature. I think it was intended to be the signature of the railway company by Pattison, its president.

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Nevertheless, I think that, by the terms of the agreement, Mr. Pattison was intended to be personally bound; and the absence of his signature is not fatal. The writing was intended to embody in a permanent record the terms of an agreement already made. It does not itself constitute the agreement; and, as I understand the transaction, the agreement was one which it was quite competent for the parties to make without any written instrument.

Yet I think it important to investigate the terms of the written agreement, because, no doubt, all concerned regarded it as embodying the agreement which had already been made. Looking, then, at the agreement for the purpose of ascertaining Mr. Pattison's liability, and for this purpose disregarding all other evidence, I think I find conclusive proof of his personal liability.

"Mr. A. J. Pattison, president of the Grand Valley Railway Company, hereby undertakes and agrees, on his own behalf and on behalf of the Grand Valley Railway Company, that he will make or cause to be made a through traffic arrangement with the C.P.R., making direct connection with the C.P.R. at Galt, in terms of the Railway Act of Canada, in such a way that current competitive freight rates will apply continuously from St. George," etc.

The addition to Mr. Pattison's name of his description, "president of the Grand Valley Railway Company," does not, as already said, detract from his individual liability. Then the agreement proceeds: "It is further agreed that the extension of the Grand Valley Railway to St. George," etc., "will be proceeded with at once." And this is followed by a proviso: "Provided always that the terms, conditions, and covenants of this agreement shall be binding upon the heirs, executors, and assigns of the said Pattison and the said Grand Valley Railway Company."

I am inclined to think that the draftsman of this agreement at first intended it to be an agreement entirely between Pattison and the plaintiffs, and that it was an afterthought which induced him to add "and the said Grand Valley Railway Company." If this is so, then the words "It is further agreed" must be translated "It is agreed between Pattison and the subscribers for bonds."

Upon the argument it was pointed out that the document was on its face defective, in that, while "parties" are spoken of, there are no parties. However, viewed not as an agreement but merely as a record of the agreement, I think it goes far to corroborate the plaintiffs' version of what the real agreement was.

Therefore, both on the document and on the oral evidence, I find this issue in favour of the plaintiffs.

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Mr. Pattison, some time after the making of this agreement, appears to have sold his interest in the railway to a third party, who undertook to assume and carry out the contracts entered into. Some dispute has arisen between Pattison and his vendee, and the vendee now refuses to carry out the bargain. Mr. Pattison relies upon this as a moral justification for his position, thinking that the contract was one which ran with the office of president.

I cannot at all agree with him in this. His railway company received the $10,000, and in selling out he, no doubt, obtained a correspondingly increased price; so that, if he is now called on to make good his undertaking, he ought not to complain.

At the trial it was agreed that the question of damages should be dealt with upon a reference, if I should be of opinion that the plaintiffs were entitled to recover. Subsequently both counsel have spoken to me and have agreed that I should myself assess the damages upon the evidence before me.

The plaintiffs' counsel contended that I should give judgment for recovery of the $10,000, upon the theory that there had been a failure of consideration: the plaintiffs undertaking to return the worthless bonds of the railway company. No case was cited that appears to me to justify the granting of this relief.

I do not think the consideration can be said to have failed: for two reasons. In the first place, the plaintiffs have the bonds; and, although the bonds may not be of great value, they undoubtedly formed part of the consideration. In the second place, I find no case in which money has been ordered to be refunded, as upon failure of consideration, where the failure is the non-performance of a promise. The $10,000 was given by the plaintiffs for the bonds of the railway company, and for the promise of the railway company and of Pattison to secure the construction of the road. This promise has not been performed, and the only remedy is damages for its breach.

Particulars were given of the damages which the plaintiffs thought they were entitled to recover, upon an entirely erroneous theory. The true principle is found in the case of *Chaplin* v. *Hicks*, [1911] 2 K.B. 786, where the Court of Appeal entirely repudiated the idea that substantial damages should not be awarded where there is difficulty in the assessment. I need not here quote what is there set forth at length.

In this case the plaintiffs expected to receive great benefit if they could secure the construction of the railway and competition between the Grand Trunk and the Canadian Pacific. In addition, they expected great convenience in the carrying on of their business, by the ready access to a railway by which incoming and outgoing freight could be handled. They expected addi-

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tional profit by the increased prosperity of the municipality in which they were interested. All these considerations were present to the minds of both parties at the time of the making of the agreement.

There were many elements of uncertainty. These could not be eliminated. If all that was hoped for came to pass, the advantage to the plaintiffs would far exceed the $10,000 paid. The price was not given for a thing certain, but was given for the chance of obtaining the great advantage hoped for. If I were to attempt to assess damages on the basis of the plaintiffs receiving all that they contemplated, then the damages would be many times the price paid. But, endeavouring to assess in the light of all the uncertainties and contingencies pointed out by counsel, and which were, no doubt, equally present to the minds of both parties at the time the agreement was made, I think I shall not go far wrong if I place the damages at the same sum as that which Pattison and his railway company induced the plaintiffs to give for this chance.

The plaintiffs profess to regard the bonds as of no value; and, while I am not allowing this to influence me in the assessment of damages, I think it is fair that any value there may be in them should go in ease of Pattison, if he is called upon to pay; and, if the plaintiffs assent, I shall direct that, upon payment of the judgment, the bonds shall be delivered to Pattison or whom he may appoint, and that any money which may be received on account of the bonds, in an action brought by other bondholders and now pending, for the realisation of the total issue, $450,000, shall be credited upon the judgment.

The judgment will, therefore, be for $10,000 and costs, subject to the provision above indicated.

Judgment for plaintiffs.

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May 20.

ROULEAU v. INTERNATIONAL ASBESTOS COMPANY.

Quebec Superior Court, (District of Arthabaska), Pouliot, J. May 20, 1912.

1. EXECUTION (§ I—3)—RIGHT TO—AGAINST WHAT—SEIZURE OF IMMOVABLE PROPERTY—ART. 2098 ET SEQ. R.S.Q. 1909.

The rights conferred by a mining license issued under the Quebec Mining Law, art. 2098 and following, R.S.Q. 1909, are immovable property and may be seized under a writ of execution.

2. EXECUTION (§ I—3)—RIGHT TO MINER'S LICENSE—TRANSFER—ABSENCE OF CONSENT OF MINISTER—R.S.Q. 1909, 2134.

The provision of art. 2134, R.S.Q. 1909, that the license is only transferable with the consent of the Minister, is a provision in favour of the Minister alone and lack of his consent to transfer cannot be set up by the debtor in opposition to the seizure.

[*Durand* v. *The City of Quebec*, 13 Que. S.C. 308, approved.]

Girouard, Beaudry & Girouard, for the plaintiff.
Crepeau & Coté, for the defendant, opposant.

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POULIOT, J., (translated):—On the 25th September, 1911, in virtue of a writ of execution *de bonis et de terris* issued on the demand of the plaintiff, the sheriff of the district of Arthabaska seized the following property:—

> The mines and mining rights covered by the mining license issued by the Department of Mines of the province of Quebec under No. 136 and covering the north-east half of lot No. 6 in the fifth range of the township of Thetford, to wit: on Cadastral lot 6A in the fifth range of the township of Thetford, containing 76 acres, and on Cadastral lot 6B in the said range and the said township, bounded on the north-east by the line between the fifth and sixth range, on the north-west by lot 6A, on the south-east by a public road and on the south-west by a line parallel to the side lines of the lot, drawn at four and a half chains from the line between lots 6A and 6B by 76 chains in depth, containing 34 20/100 acres.

The minutes of the seizure declare that a copy of the said seizure was posted in the office of the prothonotary for this district, as the company has no longer any domicile.

Attached to the documents which were returned into Court by the sheriff is a report by the bailiff, Poulin, declaring that on September 28, 1911, he served a copy of the minutes of seizure upon the defendant company by leaving a true certified copy with and speaking to Charles D. White, advocate, and agent for the said company for Lower Canada, authorized to receive any service for the said company, at his office and place of business in the city of Sherbrooke.

On October 26, 1911, upon permission of the Judge an opposition to annul was fyled which was accompanied by an affidavit of Charles D. White, advocate, of the city of Sherbrooke, calling himself agent of the company for the province of Quebec.

The only objection is that the seizure of immovable property made in the said case is irregular, illegal and null because the immovable property so seized is unseizable.

The only question which this Court is called upon to decide, therefore, is whether this property is seizable or not. It is not a question in the present case of the seizure of a title of debt in the possession of the defendant, which is unseizable (article 599, par. 12, C.P.), nor of shares or other instruments payable to bearer or by endorsement which can only be seized in a seizure of movable property (article 641, C.P.), but of an immovable real right which is placed beneath the hand of justice by means of a seizure of immovable property.

The opposant itself considers the rights seized as immovable rights, since it treats the seizure which has been made in the case as purely a seizure of immovable property.

The opposant invokes two reasons why the said property is unseizable.

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(*a*) These mining rights are excluded from being objects of commerce and are inalienable (article 1486 C.C.).

It is quite true that mines and mining rights belonging to the Crown are not objects of commerce and are inalienable so long as the Crown has not disposed of them, but the moment a mine or a mining license has been granted by it the property becomes an object of commerce and can be alienated.

The mining law as consolidated by the Act 55-56 Vict. ch. 20, sections 1440 and 1441, expressly says that mining lands and mining rights can form the object of a sale or mining license.

Section 1442 of this Act does not prohibit the alienation of these rights by the purchaser but obliges him to give notice of it to the Commissioner of Crown Lands within thirty days under pain of the penalties mentioned in section 1527 of the Act, which provides for a fine of $50.00 and costs and in default of payment an imprisonment of three months in the case of any person who transfers mining rights without giving the required notice.

The mining law as revised in the Revised Statutes of Quebec 1909, also allows the sale or licensing of mining lands (2110 and 2111). Then by an express provision (article 2112) every proprietor of mining lands as well as every holder of a mining license may sell, transfer or alienate his rights.

For this purpose it is sufficient to deliver an authentic copy or duplicate of the sale to the Minister, who registers it for a fee of ten dollars. This registration is effected within thirty days at the diligence of the vendor or purchaser.

The Revised Statutes of 1909 do not reproduce section 1527 of 55-56 Vict. ch. 20, which imposes a penalty for default to register, but "Every sale, concession or transfer not so registered shall be null as regards the Crown" says article 2112.

Consequently, by special provision of law, mines and mining rights may form the object of alienation and may be transferred by any owner of the same. These mines and mining rights may therefore be seized as forming part of the property of the debtor and being the common pledge of his creditors.

(*b*) But, says the opposant, in the present case it is not a mining concession or title of sale but simply a mining license which was originally granted to George Rouleau and finally transferred with the consent of the Department to the opposant. Such a license, it says, is, under the terms of article 2134 R.S.Q. 1909, only transferable with the consent of the Minister and in the absence of such a consent the seizure and sale cannot be effected.

If, therefore, the mining license is transferable according to the text of the statute it can be alienated and by the same fact it becomes seizable.

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It is true that the law requires the consent of the Minister to such an alienation, but the Minister alone can avail himself of the nullity which results from the lack of his consent. Consequently as Judge Andrews says in the case of *Durand* v. *City of Quebec*, 13 Q.O.R., S.C. 308, "That which is transferable is seizable" and only those persons in whose favor the prohibitive condition is imposed can set up the nullity of an alienation made contrary to the provisions of the contract.

The defendant cannot without pleading the rights of another, invoke the lack of consent by the Minister to obtain what he asks by his opposition and to have the seizure of a mining license upon the debtor in possession of the same declared null.

See *Turcott* v. *Charters*, 18 Q.O.R., S.C. 24; *Goulet* v. *Gagnon*, 18 Q.L.R. 208; *Rhéault* v. *Desbois*, 1 R. de J. 535.

The opposition should consequently be dismissed with costs.

Opposition dismissed.

REX v. COHEN.

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June 18.

Ontario Court of Appeal, Garrow, Maclaren, Meredith, and Magee, JJ.A., and Lennox, J. June 18, 1912.

1. INDICTMENT, INFORMATION AND COMPLAINT (§ II F—55)—AMENDMENT AFTER PASSING BY GRAND JURY—DIFFERENT OFFENCE.

An indictment cannot be so amended, after having been passed upon by the grand jury, to charge an offence substantially different from that charged in the original indictment.

[*Reg.* v. *Patterson*, 26 O.R. 656; *Reg.* v. *Weir* (No. 3), 3 Can. Cr. Cas. 262; *R.* v. *Benson*, [1908] 2 K.B. 278; and *R.* v. *Corrigan*, 20 O.L.R. 99, referred to.]

2. INDICTMENT, INFORMATION AND COMPLAINT (§ II F—55)—AMENDMENT —OBTAINING MONEY BY FALSE PRETENCES—GRAND JURY'S FINDING —CHANGING CHARGE TO ONE OF OBTAINING CREDIT—CRIM. CODE 1906, SEC. 405*a*.

An indictment charging an offence under section 405 of the Criminal Code, R.S.C. 1906, ch. 146, of obtaining money by false pretences, upon which a true bill has been found by the grand jury, cannot be amended at the close of the case for the Crown so as to charge an offence under section 405*a* of obtaining credit by false pretences, inasmuch as the two offences are not substantially of the same nature.

[*Reg.* v. *Boyd*, Que. 5 Q.B. 1, referred to.]

3. INDICTMENT, INFORMATION AND COMPLAINT (§ IV—70)—QUASHING—SUBSTITUTING DIFFERENT OFFENCE AFTER GRAND JURY'S ASSENT—CRIM. CODE 1906, SEC. 1019.

Where an indictment, upon which a true bill has been found by the grand jury, has been amended at the close of the case for the Crown so as to charge an offence substantially different from that charged in the original indictment, and the accused has been convicted of the offence charged in the amended indictment, a substantial wrong or miscarriage has occurred at the trial, inasmuch as the accused has been convicted upon a charge which has not been dealt with by the grand jury, and section 1019 of the Criminal Code, R.S.C. 1906, ch. 146, is, therefore, inapplicable, and the conviction must be quashed.

[*R.* v. *Bates*, [1911] 1 K.B. 964, referred to.]

CASE stated by J. H. Denton, Esquire, one of the Junior Statement

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Statement

Judges of the County Court of the County of York, presiding as Chairman at the General Sessions of the Peace, as follows:—

"On the 20th and 21st days of March, 1912, the prisoner was tried at the General Sessions of the Peace for the County of York on an indictment which, before amendment, read as follows: 'That Harry Cohen, at the City of Toronto, in the County of York, on or about the month of February, 1909, did, knowingly and fraudulently by false pretences, obtain from the Northern Crown Bank five thousand dollars, with intent to defraud the said Northern Crown Bank, contrary to the Criminal Code.'

"The evidence for the Crown developed the following state of facts.

"A joint stock company, known as 'The National Metzo and Biscuit Company Limited,' was incorporated and organised and began to do business in Toronto in the year 1907, the main object of the company being to manufacture and sell what is known as 'Passover' bread and biscuits, consumed by Hebrew people generally.

"The prisoner, his father, brother, and two others, were the directors of the company, which commenced to do business with the Agnes Street branch of the Northern Crown Bank, in the autumn of the year 1907. The manager of the company was one Weinstock, and the manager of the Agnes Street branch of the Northern Crown Bank was one Gurofsky.

"On the 28th January, 1909, the position of the company with the bank was as follows. The company owed the bank $3,000 on the note of the company, under discount, and $1,124.41, the amount of an overdraft, and there was an indirect liability on customers' paper, under discount, of $548. The bank asked for a settlement or readjustment of the account. On the 28th January, 1909, Gurofsky wrote to the head office of the bank, pointing out the condition of the company, and asked for the company a line of credit of $10,000, consisting of $5,000 on its own note and $5,000 on trade paper, the whole to be guaranteed by the directors, of whom the prisoner was one.

"On the 3rd February, 1909, the directors of the bank considered the application, and decided to decline it until a statement of the affairs of the guarantors was presented.

"On the 8th February, 1909, the prisoner signed a statement of his affairs, shewing a surplus of $11,500, which, as a matter of fact, was untrue, in that no mention was made of a liability of $2,200 to his second cousin, to whom, about four months afterwards, he conveyed the real estate referred to in the statement. This statement of affairs, signed by the prisoner, together with statements signed by the other directors of the company, was forwarded by Gurofsky to the head office of his bank; and on the 9th February, 1909, the directors of the bank

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met, and the application for a credit of $10,000—$5,000 on the company's own name and $5,000 on trade paper—was granted, on the understanding that the direct loans be increased to $5,000 only, with the guarantors suggested. Shortly after this, a document called 'the guarantee' was signed by the prisoner and his co-directors, and the credit of the company (in addition to the credit on trade paper) was increased from $3,000 to $5,000.

Statement

"At the close of the Crown's case, counsel for the prisoner contended that the evidence, at most, disclosed a case of obtaining *credit* by false pretences; and that, as credit was something incapable of being stolen, the prisoner could not be found guilty upon the charge of obtaining money by false pretences.

"I gave effect to that objection; but, it appearing to me that the prisoner would not be misled or prejudiced in his defence by an amendment of the indictment to make it conform with the evidence adduced, I did, for reasons which appear in the evidence at the close of the Crown's case, amend the indictment to read as follows: 'That Harry Cohen, at the City of Toronto, in the County of York, on or about the month of February, 1909, did, in incurring a debt or liability to the Northern Crown Bank of Canada, obtain credit from the said bank under false pretences, contrary to the Criminal Code.'

"Upon such amended indictment the trial proceeded, and the jury found the prisoner 'guilty.'

"The prisoner's counsel asked for a stated case on the question of law as to my power to make the amendment in question. This request was granted, sentence was postponed, and the prisoner admitted to bail.

"The indictment and the evidence taken at the trial, together with the exhibits, are forwarded herewith and made part of this case.

"I reserve the following question for the opinion of the Court of Appeal:—

"Had I the power to amend the indictment at the time and in the manner stated?"

The conviction was quashed.

Argument

T. C. Robinette, K.C., for the defendant, argued that the learned trial Judge had no power to amend the indictment, which charged an offence under sec. 405* of the Criminal Code, R.S.C. 1906, ch. 146, so as to make it charge an offence under sec. 405A†; and referred to *Regina* v. *Norton* (1886), 16 Cox

* 405. Every one is guilty of an indictable offence and liable to three years' imprisonment who, with intent to defraud, by any false pretence, either directly or through the medium of any contract obtained by such false pretence, obtains anything capable of being stolen, or procures anything capable of being stolen to be delivered to any other person than himself.

† Added by 7 & 8 Edw. VII. ch. 18, sec. 6, reading: 405A. Every one is guilty of an indictable offence and liable to one year's imprisonment who, in incurring any debt or liability, obtains credit under false pretences, or by means of any fraud.

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C.C. 59; *Rex* v. *Wheatly* (1761), 2 Burr. 1125; *Regina* v. *James* (1871), 12 Cox C.C. 127, the last-named case being very similar to the case at bar. The Judge should have dismissed the case, following *Regina* v. *Boyd* (1896), Q.R. 5 Q.B. 1.

J. R. Cartwright, K.C., and *E. Bayly*, K.C., for the Crown, argued that secs. 405 and 405A must be read together; and that the amendment of the indictment was within the powers of the trial Judge, under secs. 889 and 890 of the Code, which are more general and unrestricted than the powers of the Court under the English statutes, and the Canadian Acts prior to the Code. [LENNOX, J., referred to *The Queen* v. *Weir* (No. 3) (1899), 3 Can. Crim. Cas. 262, as to the point whether or not the amendment would render a different plea necessary.] The cases are collected in Russell on Crimes, Canadian ed., p. 1971 *et seq.*—see especially note (*m*) on p. 1974, where the principle to be followed in such cases is laid down by Byles, J. It it true that, if the present case arose in England, *The King* v. *Benson*, [1908] 2 K.B. 270, would be conclusive against the Crown; but a different rule applies here. There has been no substantial miscarriage of justice, and the crime of which the defendant has been convicted is not a different crime from that for which he was originally indicted, but the same crime with a different face. Reference was made to Taylor on Evidence, 10th ed., sec. 253; *Cooke* v. *Stratford* (1844), 13 M. & W. 379, 387.

Robinette, in reply, argued that no amendment could be made which altered the nature or quality of an offence, and referred to *Regina* v. *Wright* (1860), 2 F. & F. 320, *per* Hill, J., at p. 325; *Regina* v. *Bailey* (1852), 6 Cox C.C. 29.

Maclaren, J.A.

June 18, 1912. MACLAREN, J.A.:—The defendant was indicted at the General Sessions, Toronto, for having, knowingly and fraudulently by false pretences, obtained from the Northern Crown Bank five thousand dollars, with intent to defraud the said bank; and the grand jury returned a true bill against him.

During the trial, at the close of the case for the Crown, the defendant's counsel took the objection that the offence charged in the indictment had not been made out; that sec. 405 of the Criminal Code, under which the charge was laid, required that the accused must have obtained something capable of being stolen; whereas, according to the evidence for the Crown, the most that had been obtained from the bank in this case was a line of credit for a joint stock company, of which the defendant was a director, and credit was something that could not be stolen. Counsel relied upon a decision of the Quebec Court of Appeal: *Regina* v. *Boyd*, Q.R. 5 Q.B. 1.

The County Court Judge held that the objection was well taken; but that the indictment might be amended by striking out the words charging the defendant with obtaining the $5,000, and substituting a charge under sec. 405A of the Code that,

"in incurring a debt or liability to the Northern Crown Bank, he obtained credit from the said bank under false pretences," and the indictment was so amended. This section, 405A, was added to the Code in 1907 by 7 & 8 Edw. VII. ch. 18, sec. 6, to supply the defect in the law pointed out in the *Boyd* case.

The trial proceeded on the amended indictment, and the jury found the defendant "guilty". At the request of counsel for the defence, the Judge reserved for this Court the following question: "Had I the power to amend the indictment at the time and in the manner stated?"

The law as to the amendment of an indictment in a case like the present is found in sec. 889 of the Code, which provides: "If on the trial of any indictment there appears to be a variance between the evidence given and the charge in any count in the indictment . . . the Court before which the case is tried may, if of opinion that the accused has not been misled or prejudiced in his defence by such variance, amend the indictment or any count in it or any . . . particular so as to make it conformable with the proof." Section 890 (3) provides: "The propriety of making or refusing to make any such amendment shall be deemed a question for the Court, and the decision of the Court upon it may be reserved for the Court of Appeal, or may be brought before the Court of Appeal by appeal like any other question of law."

Section 889, above quoted, was first enacted in the Criminal Code of 1892, as sec. 723. Although it has been in force for nearly twenty years, and has been largely used, we were not referred at the argument to a single reported case in which it has been construed by any Court. The corresponding provision in the English criminal law is very different, so that we do not find any direct authority there. It is sec. 1 of 14 & 15 Vict. ch. 100, and enumerates a list of amendments that may be made, such as variances in the names of places, persons, owners of property, etc., or in the name or description of any matter or thing named or described in the indictment. Our own law before 1892 was not unlike the English, and is to be found in R.S.C. 1886, ch. 174, sec. 238, where any variance in "names, dates, places or other matters or circumstances . . . not material to the merits of the case, and by the misstatement whereof the person on trial cannot be prejudiced in his defence on such merits," may be amended by the Court. This was taken from the Criminal Procedure Act of 1869, which was practically an adaptation of the English statute of 1851.

There are two reported cases in which amendments under sec. 889 of the Code (then sec. 723) were discussed and upheld. The first is *Regina* v. *Patterson* (1895), 26 O.R. 656, where an indictment was laid for obtaining two cheques by false pretences, the false pretence being "that there was then a large quantity

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of beans, to wit, 2,680 bushels of beans," in a certain warehouse. The words, "a large quantity of beans, to wit," were struck out of the indictment, and the prisoner was convicted. A Divisional Court upheld the conviction, and held that the indictment as amended was substantially the same as the one on which the grand jury found a true bill. It was pointed out that the Code did not require the indictment to state in what the false pretence consisted.

The other is a Montreal case, *The Queen* v. *Weir* (No. 3), 3 Can. Crim. Cas. 262, where an indictment for making false returns under the Bank Act was amended by inserting the word "containing" before the words "a wilful, false, and deceptive statement," etc. Wurtele, J., said, at p. 268: "The correction in no way changes the character or nature of the offence, and as the defendant knew to the same extent before and after the amendment what he was accused of, he was neither misled nor prejudiced by it. . . . In fine, if the transaction is not altered by the amendment, but remains precisely the same, the amendment ought to be allowed; but, if the amendment would substitute a different transaction from that alleged, or would render a different plea necessary, it ought not to be made."

Although secs. 405 and 405A both relate to false pretences, yet they differ. The former relates exclusively to obtaining money, chattels, etc., something "capable of being stolen," the latter exclusively to the obtaining of credit; the punishment in the former case may be three years' imprisonment, in the latter the maximum is one year; the former is an adaptation of sec. 86 of the English Larceny Act; the latter is derived from sec. 13 of the English Debtors Act, 1869 (32 & 33 Vict. ch. 62).

If the amendment had been simply the substitution of another article capable of being stolen, as, for instance, the substitution of promissory notes or other valuable securities for the "five thousand dollars," the transaction being the same as that disclosed in the preliminary examination, to use the language of Wurtele, J., it would seem to me that the amendment might have been upheld.

Another question of importance is, whether the defendant was not deprived of his right to have the grand jury pass upon his case. It may be argued that the grand jury have not found a true bill against him for the offence for which he was tried. The formula by which the grand jury give their assent to the bill reported by their foreman is, that they are content that the Court shall amend any matter of form in the indictment, altering no matter of substance without their privity. May it not be said to be a matter of substance, and not of form, to substitute what may be said to be a different offence, expressed in different terms, under a different section, and with a different punishment?

It was also argued that evidence was put in by the Crown

that was admissible under the indictment before the amendment, but which would have been inadmissible under the amended indictment, and that the defendant was prejudiced thereby. Particulars of these were not given. If correct, it would, no doubt, be a serious matter. However, I do not wish to base my decision on this.

On the whole, I am of the opinion, for the foregoing reasons, that the trial Judge had not the power to amend the indictment at the time and in the manner stated, and that the question reserved by him should be answered in the negative.

Maclaren, J.A.

GARROW, J.A.:—I concur.

Garrow, J.A.

MEREDITH, J.A.:—It is not necessary to consider whether the defendant could have been convicted of the offence of obtaining money by false pretences, because he was not tried upon that charge, but was tried upon the charge, recently made by statute a criminal offence, of obtaining credit by false pretences; but I may add that, where one procures another to do that which is tantamount to paying over a sum of money by false pretences, it is at least getting very near the offence; even though the transaction is completed by that which is tantamount to an immediate deposit of the money by the person obtaining it with the person from whom it is obtained, subject to the order of the person obtaining it.

Meredith, J.A.

The question here is one very different from that, however; it is, whether the change of an indictment from one of obtaining money to one of obtaining credit by false pretences is an amendment which the law permits; and that question is solved, in my opinion, when the question whether the two charges are substantially for an offence of the same kind is truly answered. If the charge were of obtaining one thing capable of being stolen, within the meaning of sec. 405 of the Criminal Code, and the change were to something else of the same nature, the amendment might well be made; whether it ought to be would, of course, be another question. But, wide as the power of amendment is, it cannot comprehend a change from an offence of one nature to one of another; and, in my opinion, having regard to the case *Regina* v. *Boyd*, Q.R. 5 Q.B. 1, and the subsequent enactment of sec. 405A as an addition to the Criminal Code, this case should be looked at as if, before that enactment, the thing with which the defendant was charged was not one coming within the provisions of sec. 405, or of the same nature, so as to justify the amendment of the indictment which was made in this case: see *The King* v. *Benson*, [1908] 2 K.B. 270, and *Rex* v. *Corrigan* (1909), 20 O.L.R. 99.

If it were not, then there was no jurisdiction to try the defendant upon the new indictment; it was his right to have that

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charge first dealt with by a grand jury; and not to be put in jeopardy without their consent; and so some substantial wrong or miscarriage occurred at the trial, excluding the resort of the Crown to sec. 1019 of the Criminal Code to sustain the conviction: see *The King* v. *Bates*, [1911] 1 K.B. 964.

I would answer the question reserved in the negative, and direct that the conviction be quashed, and that the accused be discharged in respect of this conviction.

Magee, J.A.

MAGEE, J.A.:—The original charge of obtaining money by false pretences was framed under sec. 404 of the Criminal Code, 1906, which makes it an indictable offence to obtain, with intent to defraud, by false pretences, anything capable of being stolen. The punishment therefor is three years' imprisonment. The amended charge is framed under sec. 405A, which was added to the Code in 1907 by 7 & 8 Edw. VII. ch. 18, sec. 6, and which makes guilty of an indictable offence and liable to one year's imprisonment every one who, in incurring any debt or liability, obtains credit under false pretences or by means of any fraud. This section was, no doubt, added in consequence of the decision in *Regina* v. *Boyd*, 4 Can. Crim. Cas. 219, Q.R. 5 Q.B. 1, that obtaining credit merely did not come within sec. 405, as credit was not a thing capable of being stolen. It is taken from the Imperial Debtors Act, 1869, 32 & 33 Vict. ch. 62, sec. 13, where, however, the words are "under false pretences or by means of any other fraud." The English statutes relating to amendments in criminal proceedings are referred to in Halsbury's Laws of England, vol. 9, p. 344. Their effect was considered in *The King* v. *Benson*, [1908] 2 K.B. 270, which somewhat resembles this case. The indictment contained two counts, framed under the sections corresponding to our secs. 405 and 405A. Both counts alleged specific false pretences. The Chairman of Quarter Sessions considered that the accused had not obtained the goods (board) or credit by the false pretences alleged (of being engaged to work), but on the faith of a promise to pay on a specified day; and he struck out the first count and amended the second so as to charge that by means of fraud the accused incurred a debt in the purchase of goods. It is obvious that this amendment still left the charge in the second count one under the same section—that is, our sec. 405A. The prisoner was convicted, but, on a case being stated, the five Judges agreed that, although the Criminal Procedure Act, 1851 (14 & 15 Vict. ch. 100), sec. 1, allows amendment "in the name or description of any matter or thing," there was "no power to make an amendment substituting one offence for another." Lord Alverstone, C.J., in delivering the judgment of the Court, said: "If the Legislature had intended that one offence might be substituted for another, it would not have used language similar to that under which it allows an amendment to be made with regard to some variance

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in the ownership of property named or described in the indictment. The procedure in a criminal trial assumes that the bill of indictment has gone before the grand jury and that they have returned a true bill. To allow an amendment to be made substituting a fresh offence might have the effect of placing a prisoner upon his trial for an offence that had never been before the grand jury. The fact that the evidence may be the same to establish both cases is immaterial." He referred to the decision in *Regina* v. *Jones*, [1898] 1 Q.B. 119, as shewing that a person may be convicted of obtaining credit by means of fraud within the meaning of the Debtors Act, 1869, sec. 13, although he has made no false pretence.

The provisions of our Criminal Code, 1906, as to amendment, are wider than the English Acts. Under sec. 889 (1), "if . . . there appears to be a variance between the evidence given and the charge in any count," the Court may amend if of opinion that the accused has not been misled or prejudiced in his defence; and (2), if the indictment has been preferred under some other Act, instead of under the Code, or the converse, or if it appears that there is an omission to state or a defective statement of anything requisite to constitute the offence, or an omission to negative any exception which ought to have been negatived, but that the matter omitted is proved by the evidence, the Court may likewise amend. This was inserted in the Criminal Code of 1892, as sec. 723. Previously the provisions for amendment, R.S.C. 1886, ch. 174, secs. 237, 238, allowed amendments "in names, dates, places, or other matters or circumstances therein mentioned, not material to the merits of the case."

The present section, 889, applies to a variance "between the evidence given and the charge in any count." This cannot fairly be interpreted to authorise the change to an entirely different charge from that in the count, but only to authorise the retention in substance of the same charge, though amending it in details so as to conform to the evidence. So long as an accused person is entitled to trial by jury, and every criminal accusation so to be tried is to be first passed upon by a grand jury, the basis upon which amendments should be made appears to me to be that stated by Lord Alverstone, as already quoted, and is expressed in effect by the formula of the grand jury, which gives its consent "that the Court may amend matters of form, altering no matter of substance in this bill." Here it is a matter of such substance which is altered that the offence sought to be charged by the amendment had been held in *Regina* v. *Boyd* not to be one punishable under an indictment such as this was when assented to by the grand jury. Such a charge has, therefore, not been authorised by them. It is an offence under another and later provision of the law and not subject to the same punishment.

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It is true that, even before the Acts allowing amendments in England, a man might be charged with an offence for which he would be liable to one punishment and be convicted only of a less offence for which the punishment might not be the same, but that was because the minor charge was included in the greater, and thus was, in fact, stated in the indictment and approved by the grand jury. Here there was no such inclusion.

It is evident from the second sub-section of sec. 889 that there no change from one offence to another is intended, but that the substance of the charge which the accused has to meet must remain the same. Such, also, is, in my opinion, the effect of the first sub-section.

The power of amendment under sec. 898, when objection is taken to any indictment for "any defect apparent on the face thereof," allows the Court to cause it to be "amended in such particular;" and yet it has been held that "matters of substance cannot be (so) amended, and essential allegations which have been entirely omitted cannot be added by the Court:" *The Queen* v. *Weir* (No. 5) (1900), 3 Can. Crim. Cas. 499, 503; *The Queen* v. *Cameron* (1898), 2 Can. Crim. Cas. 173. Until Parliament expressly authorises such interference with the work of the grand jury, it would be very unsafe to allow such change as this under the guise of amendment, and I do not think it was authorised. I would, therefore, answer the question in the negative.

I express no opinion as to whether the accused should have been convicted under the original indictment. Section 405 draws a distinction between obtaining property and procuring it to be delivered to another. As to the amended charge, it is noticeable that the written representation was on the 8th February; the guarantee upon which the accused became liable is dated the 18th February; and the additional credit to the joint stock company by the discount of the $2,000 note had been given on the 8th February; and the manager of the bank appears to think it was only to take up a note on which credit therefor had previously been given.

Lennox, J.

LENNOX, J., concurred.

Conviction quashed.

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Ontario High Court, Middleton, J. June 14, 1912.

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June 14.

1. BUILDINGS (§ I A—9b)—MUNICIPAL REGULATION—ROOM IN DWELLING USED FOR LADIES' TAILORING—"MANUFACTORY."

The use of a room in a dwelling-house by three or four persons as a sewing-room wherein a ladies' tailoring business is conducted, does not render the building a "manufactory" within the meaning of a municipal by-law prohibiting the location of stores and manufactories on a certain street.

2. BUILDINGS (§ I A—9b)—MUNICIPAL REGULATION—ROOM IN DWELLING-HOUSE USED FOR LADIES' TAILORING—SALE OF CLOTH—"STORE."

The carrying on of a ladies' tailoring establishment in one room of a dwelling-house wherein cloth is sold and made into ladies' suits by three or four persons in the employ of the defendant, or made from cloth brought him by customers, renders the building a "store" within the meaning of a municipal by-law prohibiting the location of stores or manufactories on a designated street.

3. INJUNCTION (§ III—155)—PROHIBITING MAINTENANCE OF STORE IN CONTRAVENTION OF MUNICIPAL BY-LAW—WHEN TO BECOME OPERATIVE—STAY OF ENFORCEMENT.

While the failure of a city to enforce a by-law prohibiting the maintenance of a store or manufactory on a certain street, does not prevent its enforcement in subsequent cases, upon the granting of an injunction to prohibit the maintenance of a store on such street, it will be ordered that it shall not become operative for six months, so as to enable the defendant to make other arrangements.

Statement

MOTION by the plaintiffs, the Corporation of the City of Toronto, for an injunction restraining the use by the defendant of certain premises upon Avenue road, Toronto, as a ladies' tailoring establishment.

By consent of counsel, the motion was turned into a motion for judgment.

The injunction was granted not to become operative for a period of six months.

C. M. Colquhoun, for the plaintiffs.

W. C. Chisholm, K.C., for the defendant.

Middleton, J.

MIDDLETON, J.:—Section 541a of the Municipal Act, as amended by 4 Edw. VII. ch. 22, sec. 19, empowers the plaintiffs "to prevent, regulate, and control the location, erection, and use of buildings for laundries, butcher's shops, stores, and manufactories."

A by-law was passed on the 4th January, 1905, prohibiting the location of stores and manufactories upon Avenue road.

The sole question is, whether the defendant is using the house in question as a store or manufactory, within the meaning of this by-law.

In January last, the defendant rented the premises in question, which theretofore had been constructed for and used as a residence. He therein carries on a ladies' tailoring business, in

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the course of which he purchases suit lengths of cloth, sells them if approved by customers, and makes them into suits. If the goods produced do not meet the taste of the customers, he purchases goods from retail stores and makes these up. He also makes up goods brought in to him by his customers.

The building has not been structurally altered, and is used by the defendant as his residence, as well as for the purposes of his business. Those employed by him to assist him in his business use a room in the building as a sewing-room.

I do not think that this use of the building constitutes it a manufactory, within the meaning of the statute. It is true that the word "manufactory" or "factory" has a dictionary meaning wide enough to cover the case; but I think that the word, as used by the Legislature, contemplates operations on a larger scale than this, and that the use of a room in a dwelling-house by three or four persons as a sewing-room falls short of what is required.

I am, however, of opinion that what is done does constitute the premises a "store," within the meaning of the statute.

Counsel agreed, upon the argument, that the word "store" was here used as equivalent to the word "shop." It is a place where goods and merchandise are bought and sold; and, when the object of the statute is borne in mind, I think this is the thing which is intended to be prohibited. Slightly modified meanings are given to the word in different contexts. The cases may be found collected in Words and Phrases Judicially Defined, vol. 7, p. 6672. I do not see that any good purpose would be served by reviewing and attempting to classify cases here.

It is said that the plaintiffs have not enforced the by-law in similar cases. I do not think that this really affects the matter; but the circumstances, I think, justify my directing that the injunction shall not become operative for a period of six months, so as to enable the defendant to make other arrangements.

Judgment will, therefore, be for the injunction sought, with the stay indicated. I do not think it is a case in which costs should be awarded.

Judgment accordingly.

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June 22.

Ontario High Court, Riddell, J., in Chambers. June 22, 1912.

1. WILLS (§ III L—198*m*)—DISTRIBUTION OF RESIDUE—INCOME FROM—SUPPORT OF MINOR LEGATEES.

Under a will directing the executor to sell the residuary estate of the testatrix and equally divide the proceeds therefrom among her three grandsons and her granddaughter who was the youngest of the four, and providing that the grandsons' shares were to be paid to them when the youngest of them reached the age of twenty-one, and the granddaughter's share to be paid to her when she herself arrived at that age, and if any of the grandsons died before the youngest attained that age the deceased's share was to go to the survivors, and, if they all died before the granddaughter became twenty-one years old and before any shares were paid, such proceeds were to go to the next of kin, no part of such proceeds can, without the consent of the next of kin, be given to the grandchildren before the time for the division thereof, and, where the next of kin, because of their infancy, are unable to give this consent, the income of such proceeds cannot be devoted to the support of the grandchildren of the testatrix inasmuch as they may all die before the time when by the terms of the will the payment to them of the funds was to be made.

2. EXECUTORS AND ADMINISTRATORS (§ II A—21)—LIABILITY OF EXECUTOR—INVESTMENT OF MONEY—PROVISION DIRECTING DEPOSITING IN BANK—NO DISCRETION—R.S.O. 1897, CH. 130, SEC. 2.

An executor cannot, except at his own risk, invest money of an estate in disregard of the express direction of a will that it should be deposited in a chartered bank at interest until the arrival of the time fixed for the distribution thereof, and, as no discretion was conferred on the executor as to the disposal of the money, sec. 2 of ch. 130, R.S.O. 1897, giving authority to executors or trustees to invest trust moneys in their hands or to vary investments already made, at their discretion, is not applicable.

Statement

PETITION on behalf of Lottie M. Richardson, widow of the late Dr. Richardson, for an order: (1) appointing her guardian of the estate of her infant children; (2) authorising the payment to her of the income of the estate of Margaret S. W. Richardson, deceased, for the maintenance of the said infant children; and (3) for costs.

W. T. Evans, for the petitioner.

W. C. Chisholm, K.C., for the executor.

T. J. Blain, for the next of kin.

F. W. Harcourt, K.C., for the infants.

Riddell, J.

RIDDELL, J.:—As all parties interested appeared before me, and are acting harmoniously, consenting to a change of this proceeding into the proper form, I deal with the real matters presented.

By the will of Margaret S. W. Richardson, she, in clause 9, directed her executor to sell the residue of her estate, real and personal (after certain specific bequests), giving one third to her grandchild Harry R. and the other two-thirds to her grandchildren Stewart R., Gerald R., and Margaret R., in equal parts—none of these to "receive his or her share until . . .

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Margaret R. shall have attained the full age of twenty-one years, and in case . . . Margaret R. shall not have attained the age of twenty-one years at the time of my decease, I hereby direct my executor hereinafter named to deposit the proceeds of such sale at interest in some chartered bank and to keep the said proceeds so deposited until . . . Margaret R. shall have attained the age of twenty-one years, and then to hand over their respective shares with accrued interest to each of my said grandchildren. I further direct that the share or shares of any of my said grandchildren who may die before . . . Margaret R. shall have attained the age of twenty-one years, shall be divided equally amongst the survivors. In case all of my said grandchildren shall die before . . . Margaret R. shall have attained the age of twenty-one years, then in such case I give and bequeath the said proceeds of such sale to my next of kin."

This provision was modified by the third codicil of the will, dated the 27th July, 1911, which directed "the residue of my property to be divided equally amongst . . . Harry, Stewart, Gerald, and Margaret, the shares of the said Harry, Stewart, and Gerald to be paid to them when the youngest of them shall have attained the age of twenty-one years, and the share of the said Margaret to be paid to her when she shall have attained the age of twenty-one years." The ages of these grandchildren are: Harry, 18; Stewart, 15; Gerald, 12; and Margaret, 11.

Dr. Richardson, son of the testatrix and father of these infants—the petitioner being their mother—died some time ago, and the petitioner has no means to support her children with. The executors of Margaret S. W. Richardson have about $14,000 from the sale of the property directed by the will.

The present proceeding has two objects in view: (1) to have the petitioner paid some part of the money, or of the interest, to apply to the support of her younger children; (2) to permit the executors to disregard the express provisions of the will and to invest the money, instead of paying it into the bank.

The former could be done only if it were clear: (a) that the money was the money of the infants; and (b) that the express provision as to payment contained in the will could be disregarded.

To determine these points, I shall treat the present application as though it were a proceeding under Con. Rule 938 (a), (e).

It is necessary to examine with care the provisions both of clause 9 of the will and of the third codicil.

Clause 9 not only (1) directs the sale, (2) the division one-third to Harry and two-thirds to the other grandchildren, (3)

the payment when Margaret R. is 21, (4) the direction to pay into a bank until Margaret is 21, and (5) then to pay their respective shares with accrued interest to the grandchildren; but it also directs (6) that the share of any grandchild who dies before Margaret R. becomes 21, shall go to the survivors; and (7), if all die before Margaret becomes 21, the fund goes to the next of kin.

In the third codicil, clause 3 reads: "Whereas by clause 9 of my said will I directed that one-third of the residue of my estate be paid to my grandchildren Harry R. and the remaining two-thirds to my grandchildren Stewart, Gerald, and Margaret in equal shares: now I revoke that part of said clause of my said will, and I direct the residue of my property to be divided equally amongst my four grandchildren, the shares of the said Harry, Stewart, and Gerald to be paid to them when the youngest of them shall have attained the age of twenty-one years, and the share of the said Margaret to be paid to her when she shall have attained the age of twenty-one years."

Here, in addition to the express revocation of clause 9 (No. 2 above) there is also a revocation of so much of Nos. 3 and 5 as applies to the young men. There is no revocation of No. 4 so far as it relates to the payment of the money into a bank; and, while No. 6 is by implication revoked so far as it relates to the death of any of the young men at any time between the majority of Gerald and Margaret, it is not revoked as regards Margaret. But what is of most importance here is that No. 7 is not revoked. It may be that all will die before Margaret becomes 21, and the three young men before Gerald is 21, and then it would seem that the next of kin will take. Without the consent of the next of kin, which cannot be given, the same being infants, the infants cannot receive any of this money at present, as they may turn out not to be entitled to any.

2. May the executors disregard the express direction to pay into a bank? I deal with this as an application under Con. Rule 938(e) and (g).

Where executors or trustees disregard the express direction of the instrument under which they act, they cannot make money thereby for themselves and make themselves personally responsible for any loss. R.S.O. 1897 ch. 130, sec. 2, does not apply to the present case—there is no discretion given to the executors.

I do not consider it necessary to answer further.

Costs as of a motion, not of a petition, see *Re Rally*, 25 O.L.R. 112; *Re Turner*, 3 O.W.N. 1438; *Re Gordon*, 4 D.L.R. 3, 3 O.W.N. 1458, of all parties, out of the fund.

Order accordingly.

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June 7.

ZIMMERMAN v. SPROAT.

Ontario High Court. Trial before Riddell, J. June 7, 1912.

1. MORTGAGE (§ I B—6)—WHAT CONSTITUTES—EQUITABLE MORTGAGE—DEPOSIT OF DOCUMENTS OF TITLE—LAW OF ENGLAND.

The law of Ontario in respect of equitable mortgages by deposit of documents of title is the same as the law of England.

[*Royal Canadian Bank* v. *Cummer*, 15 Gr. 627; and *Maunsell* v. *Mitchell*, 26 Gr. 435, referred to.]

2. EVIDENCE (§ VI J—569)—PAROL PROOF OF INTENTION TO CREATE AN EQUITABLE MORTGAGE—SUFFICIENCY OF DELIVERY OR DEPOSIT.

The intention to create an equitable mortgage by delivery or deposit of documents of title may be established by parol evidence alone, and it is sufficient if only some or one of the material documents of title be so delivered or deposited.

[See *Russel* v. *Russel*, 1 Bro. C.C. 269; *Ex p. Haigh*, 11 Ves. 403; *Ex p. Mountfort*, 14 Ves. 606; *Ex p. Kensington*, 2 Ves. & B. 79; *Ex p. Arkwright*, 3 Mont. D. and DeG. 129, and *Lacon* v. *Allen*, 3 Drew. 579.]

3. MORTGAGE (§ I B—6)—WHAT CONSTITUTES A GOOD EQUITABLE MORTGAGE—OUTSTANDING LEGAL ESTATE.

A good equitable mortgage by deposit of documents of title may be created, although the legal estate is outstanding in another than the depositor.

[See *Ex p. Glyn*, 1 Mont. D. and DeG. 25, at p. 38; *Ex p. Binder, re Baker*, 1 Mont. D. and DeG. 333; *Lacon* v. *Allen*, 3 Drew. 579; and *Goodwin* v. *Waghorn*, 4 L.J. (N.S.), Ch. 172.]

Statement

ACTION by creditors of one Miller against Miller's assignee for the benefit of creditors to obtain payment of their debt and a declaration that they were equitable mortgagees of Miller's lands. Judgment was given for the plaintiff with costs.

P. McDonald, for the plaintiffs.

S. G. McKay, K.C., for the defendant.

Riddell, J.

June 7, 1912. RIDDELL, J.:—The plaintiffs are dealers in builders' supplies; they had supplied one Miller with certain material and had built a house for him. In June, 1910, they got from him a note at one month for $382.50 for his account; when this note became overdue, they pressed for payment—Miller was unable to pay, and the plaintiffs pressed for security. Finding that, although the debtor had not paid for his farm in full, but had given a mortgage to the vendor for a large part of the purchase-price, nevertheless the vendor had given him a deed of the farm, the plaintiffs demanded the delivery to them of the deed as security for the debt—and, for fear of fire, they also demanded the insurance policies on the building. On conflicting evidence, I find as a fact that it was agreed that Miller should deliver to the plaintiffs the deed and the insurance policies as security for the said debt; and that he did so deliver the said documents. The debt remained unpaid; and, in February, 1912, Miller made an assignment for the benefit of his creditors to the defendant

Sproat. The plaintiffs claimed an equitable mortgage upon the land; this the assignee disputed; and it was agreed that the assignee should sell the land and hold the money subject to the decision of the disputed claim. The land was sold; the assignee holds the money; the plaintiffs claim payment of their debt, and a declaration that they are equitable mortgagees.

While, by reason of the Registry Acts in force in our Province from an early date, the doctrine of equitable mortgages of this character is foreign to our ordinary ideas, there can be no doubt that our law is the same as the English in respect of such mortgages. The kind of equitable mortgage now under consideration is that which is spoken of by Fisher in his Law of Mortgage, 6th ed., sec. 27: "By an extraordinary stretch of power, Courts of Equity have held (and it is now firmly established) that notwithstanding the provisions of the Statute of Frauds an equitable mortgage may be created by the delivery to the creditor or his agent, of deeds . . . or other documents of title, with intent to create a security thereon, without any written evidence of such intent." The first reported case seems to be *Russel* v. *Russel* (1783), 1 Bro. C.C. 269. The doctrine has been often regretted—*e.g.*, by Lord Eldon—but it is too firmly established to be altered except by legislation.

The intent to create an equitable mortgage by delivery or deposit of writings may be established by parol evidence alone: *Russel* v. *Russel*, 1 Bro. C.C. 269; *Ex p. Kensington* (1813), 2 Ves. & B. 79; *Ex p. Haigh* (1805), 11 Ves. 403; *Ex p. Mountfort* (1808), 14 Ves. 606. And it is sufficient if only some or one of the material documents of title be so delivered: *Ex p. Arkwright* (1843), 3 Mont. D. & DeG. 129; *Lacon* v. *Allen* (1856), 3 Drew. 579.

Nothing will be found in the Ontario cases at all differing from the English cases. The expression "equitable mortgage" is used in other senses than that we have been considering, in some cases.

In *Dennistoun* v. *Fyfe* (1865), 11 Gr. 372, the equitable owner of property executed a mortgage—quite a different kind of "equitable mortgage." In *Jones* v. *Bank of Upper Canada* (1866), 12 Gr. 429, a debtor deposited two mortgages as collateral security—this further appears in (1867), 13 Gr. 74; and the Court declared the creditor "entitled, by virtue of the deposit of the mortgage, to an equitable lien or mortgage upon the hereditaments therein mentioned, for securing the moneys . . . :" 13 Gr. at p. 78. In *Aikins* v. *Blain* (1867), 13 Gr. 646, the mortgagor of certain lands mortgaged his equity of redemption, and this second mortgage is called an "equitable mortgage." But in *Royal Canadian Bank* v. *Cummer* (1869), 15 Gr. 627, the debtor created a mortgage in favour of the bank

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by deposit of title deeds; and in *Masuret* v. *Mitchell* (1879), 26 Gr. 435, Mrs. M. advanced a sum of $1,000, and certain title deeds were deposited with her to secure this debt—the debtor "created an equitable mortgage upon the land by deposit of the title deeds:" p. 437.

Our law being the same as that in England, I reserved judgment upon one point only of those urged. Counsel for the defendants argued that an equitable mortgage cannot be created by the deposit of a deed, where the legal title is outstanding in another than the depositor of the deed.

I find, however, no trace of any such doctrine, in text-book or case.

On the contrary, in *Ex p. Glyn* (1840), 1 Mont. D. & DeG. 25, an equitable mortgage was held to cover land which had already been mortgaged to another. See especially at p. 38, *per* Sir George Rose. Here, indeed, the mortgage was not created by deposit but by agreement; but in *Ex p. Bisdee, In re Baker* (1840), 1 Mont. D. & DeG. 333, the purchaser of an equity of redemption subject to a mortgage deposited his title deed as a security—and it was not doubted that he thereby created an effective equitable mortgage.

In *Lacon* v. *Allen* (1856), 3 Drew. 579, C. mortgaged to A. and U. and gave them up his deed—then he deposited with L. and Y. documents relating to his title, as security for a debt. This was held a good equitable mortgage. And in *Goodwin* v. *Waghorn* (1835), 4 L.J. N.S. Ch. 172, a deposit even of a map and receipt for purchase-money (the purchaser having no deed) was held a good equitable mortgage. See also *Simmons* v. *Montague*, [1909] 1 I.R. 87.

I do not think the objection well founded.

The plaintiffs will have judgment with costs.

In view of the statements under oath of Miller, the assignee was justified in disputing the claim of the plaintiffs—but that does not disentitle them to costs.

Judgment for plaintiff.

CANADIAN NORTHERN R. CO. v. BILLINGS.

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June 25.

Ontario High Court, Middleton, J. June 25, 1912.

1. WILLS (§ III E—111)—WHAT PROPERTY PASSES—RESIDUARY LEGATEE—PRIVATE ROAD—RESERVATION IN WILL—INSUFFICIENT DEDICATION.

The title to a strip of a testator's land which had been used for many years by him as a private road and which was reserved by him in his will for a public road by words which standing alone were insufficient to amount by themselves to a dedication of the strip for such purpose, passes to the devisees of the testator's residuary estate, and any one of such devisees is, therefore, entitled to defend such strip of land from trespass.

2. HIGHWAYS (§ II D—71)—ORDER OF DOMINION BOARD OF RAILWAY COMMISSIONER—PERMISSION TO CROSS STREET—EFFECT ON PRIVATE ROAD ADJOINING.

Where it appeared that a testator had for years used as a private road a strip of his lands and in his will reserved the same as a public road by words insufficient to amount to a dedication of such strip for such purpose, the reservation apparently being made for the purpose of widening a public road which was established many years after he had made his private road on a strip of land adjoining his by the owner thereof and where an order of the Dominion Board of Railway Commissioners granted the application of a railway company for permission to cross the public road which was described in the plan accompanying the application somewhat inaccurately as the road between the testator's land and the adjoining land above mentioned which order was made after a contest which was confined to the terms upon which the railway company should be permitted to cross the public road, nothing being said about the private road and no question being raised as to whether it was or was not part of the public road, such order did not give the railway company any permission to cross the private road.

3. DEDICATION (§ I A—3)—HOW SHEWN—INTENTION—WHAT AMOUNTS TO.

A dedication of land to public purposes must be made with the intention to dedicate, and the mere acting so as to lead persons into the supposition that a way was dedicated to the public does not of itself amount to dedication.

[*Simpson* v. *Attorney-General*, [1904] A.C. 476, at p. 493, followed.]

4. INJUNCTION (§ III—155)—DISCRETION OF COURT—POSTPONING OPERATIVE EFFECT OF INTERIM INJUNCTION—PERMITTING RAILWAY COMPANY TO EXPROPRIATE.

In an action by a railway company, which had the right to expropriate the land in dispute, to restrain the defendant from interfering with the construction by the company of its railway across a certain road, in which action a counterclaim was made by the defendant for a declaration of his right to the road as a private way and for an injunction restraining the company from trespassing thereon, the *ex parte* injunction granted the company should not be dissolved and the injunction awarded the defendant upon the merits in accordance with his counterclaim should not be made operative until an opportunity is given to the company to take expropriation proceedings.

[*Saadon Waterworks and Light Co.* v. *Byron N. White Co.*, 35 Can. S.C.R. 309, followed.]

Statement.

ACTION for an injunction to restrain the defendant from interfering with the construction by the plaintiffs of their railway across a certain road shewn upon a plan referred to in an order of the Dominion Board of Railway Commissioners, dated

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the 10th May, 1912; and counterclaim by the defendant for a declaration of his right to the road as a private way and an injunction restraining the plaintiffs from trespassing upon it.

G. F. Macdonnell, for the plaintiffs.

D. J. McDougal, for the defendant.

MIDDLETON, J.:—The defendant asserts that the order of the Railway Board does not apply to a strip of land fifteen feet in width along the northern limit of the road in question, and that the road referred to in the order of the Railway Board is altogether upon lot 17. The fifteen feet is in fact the southerly fifteen feet of lot 16, and constituted a private roadway leading from the River road to the old Billings homestead, used as a private road many years prior to the dedication of the public road on lot 17.

At the trial it was proved that the defendant and his predecessors in title had owned and occupied lot 16 for more than eighty years. The witness McKellar lived in the Billings residence for eighteen years, from early in 1857 to the year 1874. Mr. Charles M. Billings, son of the late Charles Billings and brother of the defendant, carried the history of the locus in quo from 1874 down to the present time.

A road was originally constructed near the southern boundary of lot 16. In 1860, it was straightened; and, from that time on until at any rate quite recently, there has been no material change. In 1860, the fence, which had theretofore been to the south of this road, was moved to the north; a ditch was constructed at the side of the road; and this road for many years was the only means of access to the house from the River road, which lies to the west of the railway track.

About 1854, the St. Lawrence and Ottawa Railway was constructed, crossing this private road. This railway is now operated by the Canadian Pacific Railway Company, and is called in the evidence "the C.P.R." Where this railway crossed the road, gates were erected, and these were generally closed. Until quite recently the gates were maintained, and occasioned no difficulty, as there was no travel save by those going from the River road to the residence.

In 1892, the late H. O. Wood laid out lot 17 in building lots, and, according to his plan, laid out a street called Billings avenue, twenty-five feet wide, to the north of lot 17. This street was immediately to the south of the old farm road upon the Billings property, which was immediately north of the division line between 16 and 17. The plan, Exhibit 5, shewed the location of this street of the old private road and of the adjoining lots.

From some time shortly after this date, the two adjoining roads have been used without much distinction. The travelled

portion of the road has been the middle of the forty feet. This portion is said to be twelve feet wide, leaving a margin of fourteen feet on each side. The gates were still maintained at the "C.P.R." crossing, and were not removed until about four years ago, when, owing to the increased traffic arising from the erection of some houses to the east of the "C.P.R.," the travel had increased to an extent which rendered the keeping of the gates closed a troublesome matter. The Canadian Pacific Railway Company then, of their own motion, took down the gates, and constructed fences and cattle-guards as shewn upon the plan, Exhibit 2.

It may be that the travelled road encroached slightly upon lot 16; but the material question to be determined, in the first place, is, whether any portion of the fifteen feet in question still remains the private property of the defendant. An encroachment of one or two feet does not seem to me to be material.

Charles Billings the elder died on the 29th November, 1906, and he left to his son, Charles M. Billings, all of lot 16 between the railway and the Rideau river, save and except a strip of land fifteen feet in width along the southern boundary, "which I hereby reserve for a public highway." He also gave to the present defendant all the remainder of lot 16. The residue of his estate is given to his two sons, share and share alike. This will is dated the 29th August, 1904, prior to the location of the Canadian Northern Railway; so that the railway referred to as constituting the division between the defendant and his brother is the "C.P.R." line.

Upon this will, I think it is clear that Charles M. Billings took only the land west of the railway and north of the fifteen-foot road in question. I think it is equally clear that it was not the testator's intention to give the road west of the railway to the defendant; as the "remainder of lot 16" means, I think, that which remains, not only after the devise to Charles of his portion, but after excepting from the lot the fifteen-foot strip to the south of Charles's, which is reserved for a public highway.

It was conceded by counsel for both parties that this reservation was quite insufficient to amount by itself to a dedication; and, therefore, the road west of the "C.P.R." would pass to the defendant and his brother as residuary devisees.

It would have been more satisfactory if Charles M. Billings had been a party to this litigation, so that the matter might now be determined once for all; but, as it is plain that what provoked the bringing of this action was the enclosure by the defendant of the land in question where the plaintiffs' line crosses the road, I think I must deal with the action as it is at present constituted; and, looking at the matter from the defend-

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ant's standpoint, I think I would also be bound to hold that one of two tenants in common is entitled to defend the land from trespass if the railway company have no title.

An application was made to the Dominion Railway Board by the plaintiffs, who had located their line immediately to the west of the land occupied by the Canadian Pacific for permission to cross "the public road between lots 16 and 17 . . . as shewn on the plan and profile on file with the Board;" and on the 7th February, 1911, an order was made by the Board giving the permission sought. Upon the hearing before the Board Mr. Billings was present. Some discussion took place as to whether he was present in his capacity as property-owner or as municipal officer. I do not think this makes any difference, as the order of the Board is in its nature a judgment *in rem*, and is binding upon all.

I am, however, unable to follow the plaintiffs' counsel when he asks me to read into this order an adjudication by the Railway Board that this fifteen feet constituted part of the public road. The order itself deals only with the public road between lots 16 and 17. The description is not particularly apt, as the road is not between 16 and 17. The road, as shewn on the registered plan, was originally part of lot 17. The private road in question is entirely part of lot 16.

The plan is said to be drawn on a scale of 400 feet to the inch; and an engineer, applying his scale, states that the road, as shewn upon the sketch or plan, scales forty feet. From this I am asked to build up an adjudication that the fifteen feet had become a public road.

The plan, although no doubt substantially correct, is not correct in other matters when tested by a scale. Stanley avenue, for example, is shewn as of much greater width than it is upon the ground or upon the registered plan.

I think the fair test as to what is concluded by the order of the Board is to consider precisely what was before the Board for adjudication. The railway company, before they can enter upon private lands, must take proper expropriation proceedings. Before they can cross a public road, they must obtain the leave of the Board. The contest before the Railway Commission was as to the terms upon which the railway should be permitted to cross the public road. Nothing was said about the adjoining private way; no contest was raised as to whether this fifteen feet was or was not part of the public road; and I do not think that the Board ever adjudicated, either intentionally or unintentionally, upon the matter now in issue.

The title to the right of way of the railway was not disclosed before me; and I must, therefore, assume that the plaintiffs have not acquired any title to the fifteen feet, and that their

action must fail, unless there has been a dedication to the public.

On the facts I do not think that there was a dedication. As said by Lord Macnaghten in *Simpson* v. *Attorney-General*, [1904] A.C. 476, at p. 493, "it is clear law that a dedication must be made with the intention to dedicate, and that the mere acting so as to lead persons into the supposition that a way is dedicated to the public does not of itself amount to dedication."

I do not think, in this case, that the defendant has done anything amounting to a dedication. In this view, the action of the plaintiffs fails, and must be dismissed. For the like reason, an injunction should be awarded to the defendant upon his counterclaim.

The plaintiffs undoubtedly have a right to expropriate; and the piece of land to be taken is of such trifling value that it is a great pity that the parties have not up to the present been able to settle. The defendant and his brother take this piece of land, impressed with the expression of their father's intention that it should be made a public highway. Probably the defendant himself will sooner or later desire to convert the strip of land to the east of the railway track into a highway, so widening the road from twenty-five to forty feet. In the meantime, the proper course is, I think, indicated by the Supreme Court of Canada; and I ought not to dissolve the injunction which has been granted to the plaintiffs or make operative the injunction which I now award to the defendant until an opportunity is given to the plaintiffs to take expropriation proceedings. This course is justified by what is said in the Supreme Court in *Sandon* v. *Byron*, 35 Can. S.C.R. 309.

This judgment will, therefore, not be operative for sixty days, so as to allow the suggested proceedings to be taken.

The defendant is, I think, entitled to his costs.

Judgment accordingly.

NATIONAL TRUST CO. v. TRUSTS AND GUARANTEE CO.

Ontario High Court. Trial before Teetzel, J. April 17, 1912.

1. CHATTEL MORTGAGE (§ III—31)—EFFECT OF OMITTING TO REGISTER—STIPULATION THAT ALL MACHINERY, ETC., WERE FIXTURES—CREDITORS—10 EDW. VII. CH. 65, SECS. 2 AND 5.

A mortgage is a "mortgage or conveyance intended to operate as a mortgage of goods and chattels" within the meaning of secs. 2 and 23 of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1897, ch. 148 (now secs. 5 and 24 of 10 Edw. VII. ch. 65), which mortgage covered the mortgagor's "undertakings then made or in course of construction, or thereafter to be constructed, together with all the property, real and personal, tolls, incomes, and sources of money, rights, privileges and franchises, owned, held, or enjoyed by it" and "all machinery of every nature and kind including all tools and implements used in connection therewith," although it stipulated

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that for the purpose of the mortgage security "all machinery, plant, and personal property of the mortgagor were to be considered fixtures to the realty" and that the mortgage was not to be registered as a bill of sale or chattel mortgage; and therefore, if such mortgage is not accompanied by an immediate delivery and an actual and continued change of possession of the things mortgaged, or is not registered as a chattel mortgage, as required by sec. 2 of that Act, it is absolutely null and void as against creditors of the mortgagor under sec. 5 of that Act (now sec. 7, 10 Edw. VII. ch. 65).

2. CHATTEL MORTGAGE (§ II C—22)—BOOK DEBTS—NECESSITY OF REGISTERING TRANSFER OF—NOTICE OF MORTGAGE BY MORTGAGEE.

Book debts are not within the Ontario Bills of Sale and Chattel Mortgage Act, R.S.O. 1897, ch. 148, now 10 Edw. VII. ch. 65, and the transfer of them does not require registration, and, therefore, the mortgagee in an unregistered mortgage covering book debts as well as other personal property which would require its registration to make it valid as against creditors of the mortgagor, is entitled to recover the amount realized from the book debts by the mortgagor's assignee for the benefit of creditors or by the liquidator appointed under the Winding-up Act, R.S.C. 1906, ch. 144, even though no notice was given by the mortgagee to those owing the book debts.

3. CHATTEL MORTGAGE (§ II C—22)—EQUITABLE CHARGE ON PRESENT OR FUTURE BOOK DEBTS.

Where a mortgage not specifically mentioning present or future book debts covers "undertakings . . . together with . . . incomes and sources of money, rights, privileges . . . held or enjoyed by [the mortgagor], now or at any time prior to the full payment of the mortgage," such language is sufficiently comprehensive to create an equitable charge on present and future book debts of the trading corporation by which the mortgage was made.

4. CORPORATIONS AND COMPANIES (§ VI F—347)—WINDING UP—PROPERTY IN POSSESSION OF ASSIGNEE FOR BENEFIT OF CREDITORS—LIQUIDATOR TAKING POSSESSION—R.S.C. 1906, CH. 144, SEC. 33.

Where a company made an assignment for the benefit of its creditors and afterwards a liquidator was appointed under the Winding-up Act, R.S.C. 1906, ch. 144, the property then in possession of the assignee for the benefit of the creditors was property to which the company "appears to be entitled," within the meaning of sec. 33 of such Act requiring the liquidator upon his appointment to "take into his custody or under his control all the property, effects, and choses in action to which the company is or appears to be entitled."

5. CORPORATIONS AND COMPANIES (§ VI E—344)—POWERS OF LIQUIDATOR—CONTESTATION OF VALIDITY OF MORTGAGE—WINDING-UP ACT, R.S.C. 1906, CH. 144.

A liquidator appointed under the Winding-up Act R.S.C. 1906, ch. 144, being from the beginning *primâ facie* lawfully in possession of the property of the company sought to be wound up as an officer of the Court, and being charged with the duty of applying the proceeds in payment of the company's creditors in due course of administration, is entitled in right of the creditors represented by him as liquidator to contest the validity of a mortgage of personal property made by the company to a trustee for bondholders without any transfer of possession having been made to such trustee and without registration under the Bills of Sale and Chattel Mortgage Act, and as liquidator to set up the invalidity of such mortgage as against the creditors in general of the mortgagor company on the ground of non-compliance with the provisions of the Bills of Sale and Chattel Mortgage Act.

6. PARTIES (§ I A 5—52*a*)—STATUS OF LIQUIDATOR—WINDING-UP ACT (CAN.)—REPRESENTATION OF CREDITORS GENERALLY.

A liquidator of a company appointed under the Winding-up Act, R.S.C. 1906, ch. 144, sufficiently represents the creditors without

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joining one of the creditors generally as a party in an action to contest as against an alleged chattel mortgagee of the company's goods the invalidity of the chattel mortgage as against creditors by reason of non-compliance with a statute requiring that chattel mortgages made without actual and continued change of possession shall be recorded, and declaring that otherwise they shall be void as against creditors of the chattel-mortgagor.

[*Re Canadian Camera and Optical Co.*, 2 O.L.R. 677, specially referred to.]

7. CHATTEL MORTGAGE (§ II C—22)—TRANSFER OF BOOK DEBTS—NECESSITY OF REGISTERING—10 EDW. VII. (ONT.) CH. 65.

A transfer of book debts is not within the Bills of Sale and Chattel Mortgage Act, 10 Edw. VII. (Ont.) ch. 65, and does not require registration under that Act in order to be valid against creditors if the transaction is otherwise unimpeachable.

[*Kitching* v. *Hicks*, 6 Ont. R. 739; *Thibaudeau* v. *Paul*, 26 Ont. R. 385, followed; *Tailby* v. *Official Receiver*, 13 App. Cas. 523, applied.]

8. CORPORATIONS AND COMPANIES (§ IV D 1—77*a*)—FLOATING CHARGE—BILLS OF SALE AND CHATTEL MORTGAGE ACT (ONT.).

A document by which the title and right to possession of chattel property of a company is transferred to a trustee for bondholders is within the purview of the Bills of Sale and Chattel Mortgage Act 10 Edw. VII. (Ont.) ch. 65, although a "floating charge" passing no property in the goods and conferring no rights of possession or interference therewith, but giving preferential rights on the winding up of a company, may be created as to present and future property of a company without coming within the terms of the Bills of Sale and Chattel Mortgage Act.

[*Johnston* v. *Wade*, 17 O.L.R. 372, specially considered; *Re London Pressed Hinge Co.*, [1905] 1 Ch. 576, specially referred to.]

Statement

ACTION by the National Trust Company Limited, trustee for the bondholders of the Raven Lake Portland Cement Company, against the Trusts and Guarantee Company Limited, liquidator of the Raven Lake Portland Cement Company, for an account of the proceeds of certain goods and chattels, book-debts and choses in action, alleged to have been converted and sold and collected by the defendant, or, in the alternative, for damages for conversion. See *Re Raven Lake Portland Cement Co., National Trust Co.* v. *Trusts and Guarantee Co.* (1911), 24 O.L.R. 286.

There was judgment for the plaintiff for the money realized from payment of the book debts outstanding at the time the cement company made the assignment for the benefit of creditors. The rest of the plaintiff's claim was dismissed without costs.

E. C. H. Cassels, for the plaintiff.
W. Laidlaw, K.C., for the defendant.

Teetzel, J.

April 17, 1912. TEETZEL, J.:—The plaintiff is trustee for bondholders of the Raven Lake Portland Cement Company, hereinafter referred to as the company, and the defendant is liquidator of that company under the Dominion Winding-up Act.

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By mortgage dated the 13th September, 1904, the company duly granted, assigned, transferred and conveyed and mortgaged to the plaintiff in trust, subject to a certain other mortgage, all and singular its undertakings then made or in course of construction or thereafter to be constructed, together with all the properties, real or personal, tolls, incomes, and sources of money, rights, privileges, and franchises, owned, held, or enjoyed by it then or at any time prior to the full payment of the bonds thereby secured, to secure payment of the bonds mentioned in the mortgage, amounting to $50,000, and interest. The lands are specifically set out in a schedule attached to the mortgage. The mortgage also purports to cover "all machinery of every nature and kind, including all tools and implements used in connection therewith, which are now or which may hereafter, during the currency of this mortgage, be brought upon the said lands or into any of the buildings thereon, including all machinery used or to be used in the manufacture of cement and plant and tools connected therewith. . . . The dredge at Raven Lake, the machinery, tools, etc., to be deemed fixtures for the purpose of this mortgage, whether the same shall be actually affixed to the said lands or buildings or not."

The 23rd and 24th clauses read as follows: "And it is further hereby declared and agreed, for the purpose of this mortgage security, that all machinery, plant, and personal property of the company are to be considered fixtures to the realty. And it is expressly understood and agreed that this mortgage is not to be registered as a bill of sale or chattel mortgage. Provided and it is hereby declared that the company may at all times, so long as there is no default in payment of principal or interest on the said bonds or otherwise hereunder, sell and dispose of its manufactured products in the ordinary course of business, free from the lien of this mortgage."

Each bond, a copy of which is set forth in the mortgage, contains this clause: "This bond is one of a series amounting in the aggregate to $50,000, and is secured by a mortgage duly executed according to law conveying to the National Trust Company Limited as trustee all the present and future real and personal properties, rights, franchises, and powers of the Raven Lake Portland Cement Company Limited, as by reference to the said mortgage will more fully appear; the nature of the security, the rights of the holders of the bonds secured by it, and the terms of the trust appear by the said mortgage, to which reference is hereby expressly directed, and which terms are made a part of this bond."

The mortgage contains the usual provisions for redemption, and that until default the mortgagors shall be permitted "to possess, operate, manage, use, and enjoy the mortgaged premises,

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and to take and use the rents, incomes, profits, and issues thereof, in the same manner and to the same extent as if these presents had not been executed."

It also contains elaborate provisions enabling the mortgagee, upon default, to take possession and operate or sell the mortgaged premises.

The mortgage was duly registered against the lands covered thereby, but was not filed as a chattel mortgage, nor was anything done to comply with secs. 2, 3, or 23 of the Bills of Sale and Chattel Mortgage Act, as from the beginning the plaintiffs assumed that the provisions of that Act did not apply to the mortgage.

On the 14th September, 1907, the company made a general assignment for the benefit of its creditors to Henry R. Morton, who entered into possession as assignee, and proceeded to realise upon the personal estate of the company.

By order dated the 20th September, 1907, made under the Dominion Winding-up Act, the company was declared to be insolvent and ordered to be wound up, the defendant appointed provisional liquidator, and a reference directed to Mr. McAndrew, an Official Referee, to appoint a permanent liquidator, and to take all necessary proceedings for and in connection with the winding-up of the company. On the 30th November, 1907, the defendant was appointed permanent liquidator.

The appointment of liquidator having superseded that of the assignee, the former took possession of all the assets of the company, and proceeded to convert the same into money and to collect outstanding accounts and generally to administer the affairs of the company.

By the 8th September, 1909 (the date of the liquidator's statement of receipts and disbursements), the defendant had apparently realised upon all the convertible assets of the company; and, so far as I can judge from the statement, those assets consisted chiefly of manufactured cement, sacks for cement, coal, book-accounts, and cash received from the assignee as proceeds of goods sold and book-debts collected, before he handed the estate over to the defendant. It does not appear that machinery or anything in the nature of fixtures was realised upon by the defendant.

By letter of the 9th November, 1907, the plaintiff gave the defendant notice of the mortgage, stating that it covered all the property of the company, and was in default, but no steps were taken to recover the goods and chattels then in the defendant's possession, or their proceeds, till October, 1909, when the plaintiff served a notice, in the winding-up proceedings, claiming all the proceeds of the assets of the company realised by the defendant as liquidator, and all other assets (if any) which may

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be unrealised in the hands of the liquidator, upon the ground that all such assets belonged to the plaintiff by virtue of the above-recited mortgage.

Nothing appears to have been done under this notice until the 28th September, 1910, when joint objections to the plaintiff's claim were filed and served by the defendant and the Imperial Plaster Company Limited, the latter "on behalf of themselves and all other creditors of the Raven Lake Portland Cement Company Limited," upon the ground, among others, that the mortgage was void for non-compliance with the Bills of Sale and Chattel Mortgage Act, and that the assets were not covered by the mortgage. Instead of adjudicating upon the claim and the objections thereto, the learned Referee, on the 3rd November, 1910, granted leave to issue a writ and prosecute an action against the defendant "in respect of goods and chattels and book-debts and choses in action formerly belonging to the Raven Lake Portland Cement Company Limited, or the proceeds thereof, claimed by the National Trust Company Limited."

This action was accordingly brought, but it is to be observed that the other contestant, the Imperial Plaster Company Limited, was neither made a party to the action, nor was its objection adjudicated upon by the Referee.

An application was made to the Master in Chambers by the defendant to have that company added as a party defendant, but the motion was refused, and the refusal was sustained on appeal, without prejudice to an application being made to the trial Judge, if it should appear to him that the proposed defendant is a necessary party to enable him to adjudicate upon the title to the money in question.

The statement of claim sets forth the mortgage, alleges default and non-payment, and charges that, notwithstanding the plaintiff's rights under the mortgage, the defendant took possession of certain goods and chattels, the property of the said company and subject to the plaintiff's mortgage, and sold the same, and also collected certain book-debts and choses in action, the property of the said company, and wrongfully converted the same to its own use, and refused to deliver the same or account for the proceeds thereof to the plaintiff; and the plaintiff claims an account of the same, or, in the alternative, damages for conversion of the said goods, chattels, and book-accounts.

The defendant pleads the winding-up proceedings, disclaims any personal right or interest in the property, denies unlawful conversion, submits that the Imperial Plaster Company Limited, on behalf of itself and all other creditors, should be added as a party defendant, and repeats the objections to the plaintiff's claim set forth in the notice of contestation above referred to.

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The following questions arise for determination:—

(1) Does the mortgage bind the goods and chattels in question notwithstanding the provisions of the Bills of Sale and Chattel Mortgage Act?

(2) Does the mortgage bind the book-accounts in question, or any of them?

(3) Is the defendant, as liquidator, entitled to contest the plaintiff's claim on the ground that the provisions of the Bills of Sale and Chattel Mortgage Act were not complied with?

(4) If the defendant is not so entitled, should the Imperial Plaster Company Limited be added as a party defendant?

Upon the first question, counsel for the plaintiff submits that the mortgage creates a floating security, and as such extends to all personal property of the company, whether existing at the date of the mortgage or subsequently acquired, and relies upon the decision in *Johnston* v. *Wade* (1908), 17 O.L.R. 372, to support his argument that the provisions of the Bills of Sale and Chattel Mortgage Act are not applicable to this mortgage.

In that case there was not, as in this case, a mortgage to secure bonds; but the bonds, upon their face and in the conditions endorsed upon them (see p. 390), declared that all the company's "property, real and personal, rights, powers, and assets of every kind and description, present and future, including its uncalled capital," were charged with the payment of the bonds. The decision in that case was, that such bonds, issued pursuant to a by-law passed under the provisions of the Companies Act, then R.S.O. 1897, ch. 191, sec. 49, were not mortgages of goods and chattels of an incorporated company within the meaning of the Bills of Sale and Chattel Mortgage Act, and were not, therefore, void as against the defendant, the assignee of the company for the benefit of creditors, because not registered under the provisions of that Act. After reviewing the authorities in England which hold that such debentures need not be registered under the English Bills of Sale Act in order to be effective against other creditors, and referring to the language of sec. 2 of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1897, ch. 148, the Chief Justice of Ontario (p. 386) observes: "The words 'mortgage or conveyance intended to operate as a mortgage of goods and chattels' describe instruments of a well-known character. They do not convey the idea of debentures of the kind in question here, which pass no property in the goods and chattels to the holder, and confer upon him no right to take possession of them or interfere with them in any way, except through the interposition of the Court. It seems plain that such an instrument was not within the meaning of the Act or in the mind of its framers, as it stood prior to the passing of sec. 23. That section, as amended by 4 Edw. VII.

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ch. 10, sec. 36, provides that 'in the case of a mortgage or conveyance of goods and chattels of any incorporated company made to a bondholder or bondholders or to a trustee or trustees for the purpose of securing the bonds or debentures of such company,' the affidavit of *bona fides* may be made as therein prescribed. Here again the difficulty presents itself that the section applies only to a mortgage or conveyance of goods and chattels. And on its face it seems to exclude a bond or debenture simply. It deals with the case of a mortgage or conveyance made for the purpose of securing the bonds or debentures of a company; and enacts (amongst other things) that the affidavit may be made by the mortgagee or one of the mortgagees, all which seems quite inapplicable to bonds or debentures by themselves." Mr. Justice Osler, at p. 388, says: "Section 23 of the Act shews how far the Legislature intended to go in dealing with instruments for securing the bonds or debentures of a company. The only instruments of that class which are required to be registered are mortgages or conveyances of goods and chattels made to a bondholder or trustee for the purpose of securing the bonds or debentures of the company—instruments, as I understand the section, of the some character as those mentioned in other sections of the Act, something quite different from the security by way of floating charge which the Companies Act enables a company to create by the bonds themselves." Mr. Justice Meredith, at p. 390, says: "There was no mortgage given for securing payment of these bonds, but they, upon their face and in the conditions endorsed on them, declared that all the company's 'property, real and personal, rights, powers, and assets of every kind and description, present and future, including its uncalled capital,' were charged with the payment of the bonds. That the bonds are not mortgages, or conveyances intended to operate as mortgages, of goods and chattels, within the provisions of the Bills of Sale and Chattel Mortgage Act, I cannot but think plain: they are neither in form nor in substance such a mortgage. Under them no title to the property in, or right to possession of, the chattels passed to the bondholders: a charge upon the chattels and other the property of the company was created, giving them priority of payment out of the assets of the company."

The validity and effect of what is called a "floating charge" on the property, both present and future, of a company, has been the subject of much judicial consideration in England. The cases are collected and discussed in Palmer's Company Law, 9th ed., pp. 307-311, where it is pointed out that it has been well-settled by the authorities that a floating charge is valid as against execution and general creditors, whether in a winding-up or otherwise, and retains its floating character, unless other-

wise agreed, until a receiver is appointed or a winding-up commences.

As to the injustice to subsequent execution creditors arising from the nature of a floating security as defined by the authorities, see observations of Buckley, J., in *In re London Pressed Hinge Co.*, [1905] 1 Ch. 576, at p. 583; also the dissenting judgment of Garrow, J.A., in *Johnston* v. *Wade*, 17 O.L.R. at p. 392 *et seq.*

The English Companies Act, 1908, sec. 93, providing for registration of floating charges and declaring them void as against creditors unless registered, would appear to remove the danger of injustice to other creditors, in England; and it may be that our statute-law should also be amended, in view of the holding in *Johnston* v. *Wade*, by declaring them void against creditors unless registered under sec. 78 of the Ontario Companies Act, 1907.

As pointed out by the Chief Justice of Ontario, in *Johnston* v. *Wade*, at p. 386, the English cases, "turning as they do upon the terms of legislation which is not the same as our provincial legislation, afford but little assistance, and in the last analysis we must have recourse to the language of the Acts of our own Legislature;" and the judgment in that case is clearly based on the conclusion that a debenture on its face charging the property of a company with its payment was not a "mortgage or conveyance intended to operate as a mortgage of goods and chattels," within the meaning or contemplation of our Bills of Sale and Chattel Mortgage Act.

That case is, therefore, differentiated from this case by the fact that in this case the bonds do not create the charge, but a mortgage is given which creates the charge in favour of a trustee for the bondholders; and, although it embraces the company's real as well as its personal property, I think that, so far as it purports to charge personal property, it is clearly a "mortgage or conveyance intended to operate as a mortgage of goods and chattels," within the meaning of secs. 2 and 23 of our Bills of Sale and Chattel Mortgage Act; and, not having been accompanied by an immediate delivery and an actual and continued change of possession of the things mortgaged, and not having been registered as a chattel mortgage, is, as such, under sec. 5 of the Act, "absolutely null and void as against creditors of the mortgagor."

As a chattel mortgage, it was also void *ab initio* as against creditors, according to the view of the late Chief Justice Strong in *Clarkson* v. *McMaster & Co.* (1895), 25 Can. S.C.R. 96, at pp. 105-6, by reason of the agreement that it should not be registered under the Bills of Sale and Chattel Mortgage Act.

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Then, as to the book-debts, it is well settled that they are not within the Bills of Sale and Chattel Mortgage Act, and that a transfer of them does not require registration: *Kitching* v. *Hicks* (1884), 6 O.R. 739; *Tailby* v. *Official Receiver* (1888), 13 App. Cas. 523; *Thibaudeau* v. *Paul* (1894), 26 O.R. 385.

While the mortgage in question does not specifically mention present or future book-debts, I think the language "undertakings . . . together with . . . incomes, and sources of money, rights, privileges . . . held or enjoyed by it now or at any time prior to the full payment," etc., is sufficiently comprehensive to create an equitable charge on present and future book-debts. In *Re Perth Flax and Cordage Co.* (1909), 13 O.W.R. 1140, where the language of the chattel mortgage was "all property, real and personal, that shall hereafter be acquired and owned by the company," it was held that these words were amply sufficient to include future book-debts. A charge created by such general language as that employed in this mortgage attaches, I think, to the subject charged, in the varying condition it happens to be from time to time. See *Governments Stock and Other Securities Investment Co.* v. *Manila R.W. Co.*, [1897] A.C. 81, at p. 86; and Buckley's Companies Acts, 9th ed., pp. 230, 231.

I am of opinion, therefore, that as to any book-debts that were unpaid at the date of the assignment by the company, the plaintiff is entitled to recover the amount that was realised therefrom by the assignee or the defendant; and that the fact that no notice of the charge was given by the plaintiff to the debtors does not, as argued by Mr. Laidlaw, alter that right. Upon this point, *Thibaudeau* v. *Paul*, 26 O.R. 385, *Re Perth Flax and Cordage Co.*, 13 O.W.R. 1140, and *Eby-Blain Co.* v. *Montreal Packing Co.* (1908), 17 O.L.R. 292, are, I think, conclusive.

The question of the right of the defendant as liquidator to contest the plaintiff's claim under the mortgage, and to hold the proceeds of the chattel property for the benefit of the creditors, has given me much trouble; but I have arrived at the conclusion that the defendant has that right, and that it is not necessary, for the purpose of adjudicating upon the title to the fund in question, to add the Imperial Plaster Company as a defendant. Under sec. 33 of the Winding-up Act, the liquidator, upon his appointment, "shall take into his custody or under his control, all the property, effects and choses in action to which the company is or appears to be entitled." Having done this, further general duties are, as stated in Palmer's Company Law, 9th ed., p. 395, "to make out the requisite lists of contributories and of creditors, to have disputed cases adjudicated upon, to realise the assets, and to apply the proceeds in payment of the company's debts and liabilities, in due course of administration, and, having done that, to divide any surplus amongst the contributories, and to adjust their rights."

While the title of the estate of the company does not, under the Act, vest in the liquidator, it must clearly be his duty, as an officer of the Court, when he has in his custody property to which the company appears to be entitled, to protect that property for the benefit of the creditors who may be interested therein. Now, when the defendant, as liquidator, took possession of the property in question, which was then in the possession of the company's assignee for creditors, it was property to which, within the meaning of sec. 33, the company or its assignee for creditors "appeared to be entitled."

Had the liquidator given up this property or its proceeds, either when notified of the plaintiff's mortgage or when the property was demanded, without submitting to the Court the claim on behalf of creditors to the effect that the plaintiff's mortgage was void as against them, the liquidator would, I think, have committed a gross breach of duty. When the claim was presented, by the plaintiff, the liquidator joined with a creditor on behalf of all other creditors of the company in contesting it, under secs. 85 to 90 of the Act. Instead of submitting to a summary disposition of the matter before the Official Referee, the plaintiff elected, upon leave of the Court, to bring this action against the liquidator only.

In *Re Canadian Camera and Optical Co.* (1901), 2 O.L.R. 677, at p. 679, Street, J., observes: "It is necessary to bear in mind the position in which a liquidator stands in a compulsory winding-up, viz., that, while in no sense an assignee for value of the company, yet he stands for the creditors of the company, and is entitled to enforce their rights, because their right to prosecute actions themselves against the company and to recover their claims directly out of the property of the company is taken away by the Winding-up Act."

Being, therefore, from the beginning, *primâ facie* lawfully in possession of the property in question, as an officer of the Court, and being charged with the duty of applying the proceeds in payment of the company's creditors in due course of administration, I hold that the defendant is entitled, in right of the creditors represented by it as liquidator, to contest in this action the validity of the plaintiff's mortgage.

Under the circumstances found in this case, the liquidator is, I think, entitled to maintain in defence of the action the superior claim of the creditors whom it represents.

Discussing the defence of *jus tertii*, it is stated in Clerk & Lindsell on Torts, 3rd ed., p. 252, that, "if the plaintiff makes out a good *primâ facie* title by possession or otherwise, the defendant must in the first place impeach that title by shewing that there is a better right in some one else. That better right may be in himself or in some person under whose authority he is

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acting, or under whom he claims, and in such a case he clearly has a good defence, for a man cannot be guilty of trespass or conversion in respect of goods to the possession of which he is entitled."

Here the defendant's position is strengthened by the fact that, at the time of the action, the *primâ facie* title by possession was in the defendant. See, further, as to defence of title of third party, *Richards* v. *Jenkins* (1886), 17 Q.B.D. 544, affirmed in (1887), 18 Q.B.D. 451.

Judgment will be in favour of the plaintiff for payment by the defendant of all money realised from book-debts outstanding and unpaid at the date of the assignment, the 14th September, 1907, but dismissing the balance of the plaintiff's claim, and declaring that the mortgage was as a chattel mortgage void as against the creditors of the company. No costs of action to either party, but the defendant's costs will be paid out of the balance of the fund, as between solicitor and client.

If the parties cannot agree upon the amount to be paid to the plaintiff, there will be a reference to the Master in Ordinary, with costs of such reference reserved until after the Master's report.

Judgment for plaintiff accordingly.

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July 15.

GUNDY v. JOHNSTON.

Ontario High Court, Kelly, J., in Chambers. July 15, 1912.

JUDGMENT (§ I E—46)—SUMMARY JUDGMENT—ACTION BY SOLICITOR FOR COSTS.

Summary judgment should not be ordered under Rule 603 (Ont. C.R. 1897) in an action by a solicitor against his client for costs of an action against a municipal corporation as to the validity of a drainage by-law which was disposed of by a special statute validating the by-law and fixing and directing payment of the client's costs as between solicitor and client by the municipality, where the fund for payment of such costs was held by the municipality, subject to notice of the solicitor's lien and the client produced evidence to shew that such fund was intended to go to the solicitor and consented to the fund being held by the municipal corporation subject to the lien claim pending the trial of the action.

Statement

APPEAL by the defendant from an order of the Local Judge at Chatham, dated the 6th July, 1912, under Con. Rule 603, allowing the plaintiffs to enter summary judgment against the defendant in an action by solicitors to recover sums alleged to be due by the defendant for costs.

The appeal was allowed and the judgment set aside.

Shirley Denison, K.C., for the defendant.

H. S. White, for the plaintiffs.

Kelly, J.

KELLY, J.:—On the evidence adduced, I do not think summary judgment should have been given in this case. The de-

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fendant shewed a reasonable ground for his objection to the claim put forward by the plaintiffs that the $1,800 directed by sec. 6 of 2 Geo. V. ch. 125 to be paid by the Corporation of the Township of Tilbury East to the defendant, as his costs as between solicitor and client in the litigation therein referred to, was intended to be in payment of the plaintiffs' solicitor and client costs against him in that litigation, and that they are entitled to all of that sum.

The defendant's objection is bona fide and of such a kind that opportunity should have been afforded of disposing of the matter in dispute in the ordinary way, and not on a summary application for judgment.

Then as to the items in the endorsement on the writ of summons, other than the $1,800 item, the defendant has taken the objection that those items are subject to taxation before judgment being given upon them; and his objection is well taken.

For these and other reasons, the judgment should, in my opinion, be set aside.

It is stated that the township corporation, in whose hands the $1,800, or part of it, is, have been notified of the solicitors' lien claimed by the plaintiffs, and that the defendant acknowledges such lien to the extent of whatever may be the true amount due by him to the plaintiffs.

In view of this, the money should not be withdrawn from or paid over by the township corporation pending the determination of the question in dispute.

The costs of this appeal, and of the motion for the judgment now set aside, are reserved to be disposed of at the trial or other final disposition of the matter.

Judgment vacated.

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June 4.

GRAND TRUNK PACIFIC RAILWAY COMPANY (defendants, appellants) **v. Frank H. ALFRED, Bernard P. Wickham, and E. A. Wickham, carrying on business as Alfred and Wickham** (plaintiffs, respondents).

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin, and Brodeur, JJ. June 4, 1912.

1. DAMAGES (§ III A 1—44)—RAILWAY CONSTRUCTION—CONTRACT NOT AWARDED—COST OF SUPPLIES AND TEN PER CENT. AS AN AGREED ALTERNATIVE.

Where a railway company was unable to definitely award the plaintiff a contract for constructing a portion of its road, but agreed with him, that in order to keep his teams employed during the winter, he might put in supplies necessary for the construction of so much road as he could complete during the working portion of the following summer, and that the company would guarantee him, in the event of its being unable to award such contract, the cost of such supplies, together with ten per cent. advance thereon, the company upon not

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being able to award the plaintiff such contract, is liable to him for such advance upon the total cost of the supplies, and also for the loss sustained by him on a sale thereof after due notice to the company.

[*Alfred* v. *Grand Trunk Pacific R. Co.*, 5 D.L.R. 154, affirmed on appeal.]

Statement

APPEAL by the Railway Company from the judgment of the Supreme Court of Alberta, *Alfred* v. *Grand Trunk Pacific R. Co.*, 5 D.L.R. 154, 20 W.L.R. 111, which affirmed the judgment of the Chief Justice of Alberta, at the trial, on the verdict of the jury, awarding the respondents $55,148 damages for breach of a contract letting them the construction of about 40 miles of the National Transcontinental Railway westward from McLeod river. The railway company sought to have the judgment set aside or a new trial ordered.

The appeal was dismissed with costs.

Chrysler, K.C., for the appellants.

W. Nesbitt, K.C., and *J. E. Wallbridge*, for the respondents.

Fitzpatrick, C.J.

THE CHIEF JUSTICE (SIR CHARLES FITZPATRICK) agreed that the appeal should be dismissed with costs.

Idington, J.

IDINGTON, J.:—I think this appeal should be dismissed with costs for the reasons assigned in the Court below.

Duff, J.

DUFF, J.:—The questions raised on this appeal have all been dealt with, and very satisfactorily, in the judgment of Simmons, J., in which Stuart, J., concurred. I agree with the conclusions of Simmons, J., as well as with his reasoning. I will refer particularly to two points dwelt upon by Mr. Chrysler. First, it seems to me indisputable that the question whether the offer to award a contract in July was an offer of a contract reasonably within the terms of the agreement between the plaintiffs and Mr. Morse, as expressed in the telegram of December, was a question of fact for the jury. The construction of the telegram itself was not really in question at all. According to the obvious import of the document, the conditional guarantee thereby offered was to become operative in the event of it being for any reason impracticable for the company to award a contract in sufficient time to give the respondent the whole of the season of 1909 for getting forward with his work under it. Whether or not the offer of a contract as late as July was an offer reasonably within the spirit of this arrangement was a question of fact, and a question of fact governed by no legal rules or principles. It is a settled principle that where the question of reasonable time is a question of fact of that character, the jury is the proper tribunal to pass upon it.

The other question touches the matter of interest.

In the circumstances in which this question was submitted to and passed upon by the jury, I do not think it is now open to

the appellants to object to the competence of the jury to deal with it. Had counsel for the appellants at the trial insisted upon that matter being dealt with by the Court, the learned trial Judge, would, undoubtedly, have requested the jury to deal with the interest separately in their finding, so that, in the event of the matter being ultimately held to be one for the Court, the Court should be free to deal with it without disturbing the verdict as a whole. No such point was raised.

I see no reason to doubt that the counsel for the appellants acted deliberately in taking that course; and I think all parties at the trial were entitled to assume, from the course he took, that he was acquiescing in the submission of the question of interest to the jury. His clients cannot now, in the absence of some special reason, ask to have the whole of the proceedings upset in order to give effect to this objection which he deliberately refrained from taking at a time when it might have been met by a course which would have fully protected them, without loss or inconvenience to anybody.

The case might be very different if it had appeared that there had been a mistake and if the refusal to give effect to the objection would lead to some grave injustice. There is nothing of the kind here.

ANGLIN, J., agreed that the appeal should be dismissed with costs. Anglin, J.

BRODEUR, J.:—There is no doubt, from the telegram that Mr. Morse sent to Mr. Alfred on the 30th November, 1908, that he was promised either a contract for the construction of forty miles of railway, or that, if such a contract was not given to him, the appellants would purchase from him the supplies he might, during the winter, provide in the region where the construction was to be carried on. The winter is the only season when the supplies could be transported in that part of the country, and it was to the great advantage and benefit of the company that they should be provided during that season. Brodeur, J.

Mr. Morse ceased to be manager of the company some time after he made that agreement with Mr. Alfred, and he was succeeded by Mr. Chamberlain.

It has been claimed by the appellant company that they were not bound by such an agreement, because it was not formally sealed by the company itself.

As a general principle, of course, incorporated companies are bound only by their seals. That rule has been relaxed. Besides, the general manager of a railway corporation, acting within the scope of his ordinary duties, and with the knowledge of the company's officers, should bind the responsibility of the company itself.

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This case turns on a question of fact as to whether or not the company, through its new general manager, undertook, in April, 1908, to pay for the supplies according to the agreement made by Mr. Morse, in November, 1908.

The evidence of that conference between Mr. Chamberlain and Mr. Alfred is conflicting. The jury accepted, evidently, the version given by Mr. Alfred.

I do not think that, on such a question of fact, we should disturb the findings of the jury. The appeal should be dismissed with costs.

Appeal dismissed with costs.

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Aug. 7.

THE KING v. GRAVES et al.

Nova Scotia Supreme Court, Ritchie, J. August 7, 1912.

1. VENUE (§ II B—22)—CHANGE OF VENUE—CRIMINAL CASE—NEWSPAPER COMMENTS.

A change of venue will not be ordered in a criminal case on the ground that comments upon the crime made in the local press are likely to prejudice the accused persons in their trial, notwithstanding that such comments, in the opinion of the court, are such as ought not to have been made, unless something more than the possibility of prejudice is disclosed, the rights of peremptory challenge and challenge for cause being regarded as a sufficient protection in such cases.

2. VENUE (§ II B—22)—CHANGE OF VENUE—CRIMINAL CASE—PUBLICATION OF THE NAMES OF JURORS IN VIOLATION OF STATUTORY PROHIBITION.

Under sec. 884 Crim. Code, 1906, giving to the court before which any accused is, or is liable to be, indicted, or to any judge thereof, authority to make an order to hold the trial in some other place than that in which the offence was supposed to have been committed or would otherwise be tried, whenever it appears to the satisfaction of the court or judge that it is expedient to the end of justice to make such order, it is sufficient reason for changing the venue where the public officer charged by ch. 52 of N.S. Laws, 1912, with the custody of the lists of jurors drawn from time to time when the lists not required by the purposes of this Act, permitted a newspaper reporter to copy for publication the names of the jurors on a list drawn by him and other officers, in violation of another requirement of such statute that the public officers upon whom devolved the duty of drawing the lists of jurors must keep secret the names on the list except as otherwise directed by the court until four days before the opening of the term of court at which the jurors on such list are summoned to attend.

Statement

MOTION on behalf of the accused persons for change of venue in a criminal case.

Roscoe, K.C., for the prisoners, in support of application.

Wickwire, K.C., for the Crown, contra.

Ritchie, J.

RITCHIE, J.:—An application is made by Mr. Roscoe, K.C., on behalf of the accused persons for a change of venue on the ground that a fair trial cannot be had in the county of Kings' in consequence of prejudice against the accused caused by arti-

cles in the local papers and also on the ground that chapter 52 of the Acts of this province for the year 1912 has been violated. The Act referred to is as follows:—

> It shall be the duty of every prothonotary, sheriff and justice of the peace who shall be engaged in drawing any panel of petit or grand jurors to keep secret the names appearing on such panel except when otherwise directed by this chapter or by an order of a Judge on good and sufficient cause shown to him; and it shall also be the duty of every prothonotary to keep safely under lock and key at all times when not required by the purposes of this Act the panel containing the names of grand and petit jurors from time to time drawn, provided, however, that said lists shall be open to inspection by any person four days before the opening of the term of Court which the jurors in such lists are summoned to attend.

This Act came into force on the 12th of April last. The trial has been ordered for next Tuesday. Mr. Wickwire, K.C., the Crown Prosecutor, admits that the Act has been violated. A few days ago the prothonotary permitted one of the local newspaper men to take a copy of the jury and the names of the jurymen summoned to try this case were published in one of the local papers. The jury was drawn at the last June term of the Court at Kentville after the Act came into force.

Mr. Wickwire also very properly made the admission that the names of the jurymen had been known to him for some time.

I will deal, first, with the point raised by Mr. Roscoe that a fair trial cannot be had in Kings' county in consequence of prejudice likely to have been created by the local press.

Dealing with this contention alone and apart from the point about the violation of the statute I decide against it.

I have carefully examined the authorities cited by Mr. Roscoe and while there are in some of these cases observations by the Judges going a long way in support of the contention made I think that the facts in those cases are distinguishable from this case.

The facts in the cases cited I think disclose something more than a possibility of prejudice. Applications of this kind call for the exercise of sound judicial discretion upon the particular facts of each case. In my opinion portions of the articles complained of are objectionable and ought not to have been published but I am not at all satisfied that they have created a prejudice. And from any possible prejudice I think the right of challenge which the defence has, peremptory and for cause, would be sufficient protection. In my opinion some portions of what appeared in regard to this case in the Halifax *Herald* and Halifax *Chronicle* are quite as objectionable as anything which appeared in the Kings' county press. These papers circulate throughout the province and are as likely to influence any man who could be influenced in that way as the publications com-

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plained of. I therefore do not think it would serve any useful purpose to change the venue on this ground.

The ground that the venue should be changed in consequence of the violation of the statute is more serious.

What was the purpose and object of this statute? What was the mischief which it was designed to strike at? I think it was intended to curtail the opportunities of persons interested to talk with or in any way influence juries in regard to cases coming on to be tried before them. I assume that the prothonotary at Kentville did not know that this statute had been passed, but the fact remains that he allowed the newspaper man to copy it and that the list was published in the local paper. It was a direct violation of the statute.

It is clear that the intention was to have absolute secrecy as to the jury until within four days of the first day of the term. I think the Legislature intended this secrecy to be a safeguard both for the Crown and the person charged with crime. The affidavits used by Mr. Wickwire shew that persons who made affidavits on behalf of the Crown knew who were the members of the jury. This case is one which without doubt would cause some feeling in the county and the names of the jury are given to the public and any person bad enough to do so has full opportunity of talking to the jurors in regard to the subject-matter of the indictment.

The prisoner's counsel complains that the safeguard which the Legislature gave has been taken away from his clients so far as the county of Kings' is concerned.

The question for me under sec. 884 of the Code [Cr. Code of Canada, R.S.C. 1906, ch. 146] is whether it is expedient to the ends of justice that the venue be changed? I think it is and I will therefore make an order for change of venue.

The county in which the trial is to be can be settled when the order is taken out.

Order changing venue.

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Sept. 9.

ROBERTSON (appellant) v. **McALLISTER** (respondent).

His Honour Judge Widdifield, County Judge of Grey County, Ontario. September 9, 1912.

1. AUTOMOBILES (§ I—5)—PUBLIC REGULATION—OFFENCE UNDER ONTARIO MOTOR VEHICLES ACT, 2 GEO. V. CH. 48—SUMMARY CONVICTION.

A summary conviction under sec. 18 of the Ontario Motor Vehicles Act, 2 Geo. V. ch. 48, providing that if an accident occurs to any vehicle in charge of any person owing to the presence of a motor vehicle on the highway, the person in charge of such motor vehicle shall return to the scene of the accident and give in writing to anyone sustaining loss or injury, the name and address of himself and of the owner of the motor vehicle and the number of the permit, will be quashed, though the motor vehicle driven by the convicted person grazed the wheel of a passing buggy with sufficient force to loosen two

spokes in its wheel, if it appeared at the trial that the person in charge of the motor vehicle did not know or have reason to know that such an injury had resulted to the buggy.

[*Core* v. *James*, L.R. 7 Q.B. 135; *Nicholls* v. *Hall*, L.R. 8 C.P. 322; *Reg.* v. *Sleep*, 1 L. & C. 44; Hardcastle, Statutory Law, 3rd ed., 465, (5th ed.—the 2nd ed. of Craies-Hardcastle—468); Maxwell's Interpretation of Statutes, 2nd ed., 115 (5th ed., 157), specially referred to.]

APPEAL from a summary conviction of the appellant for omitting to return to the scene of the accident after a collision with a buggy on the highway by an automobile driven by the appellant.

Sec. 18 of the Motor Vehicles Act (Ont., 1912) provides:—

If an accident occurs to any . . . vehicle in charge of any person, owing to the presence of a motor vehicle on the highway, the person in charge of such motor vehicle shall return to the scene of the accident, and give in writing to any one sustaining loss or injury his name and address, and also the name and address of the owner of such motor vehicle, and the number of the permit.

Sec. 24 provides a penalty for violation of sec. 18 of $50 or one week's imprisonment, or both.

The conviction was quashed.

H. G. Tucker, for appellant.

C. S. Cameron, for respondent.

Judge Widdifield.

WIDDIFIELD, County Judge:—The appellant was convicted before a justice of the peace for a violation of the provisions of sec. 18, and now appeals. At the hearing, I found that the appellant was not to blame for the accident. The respondent was driving along the highway and when the appellant wanted to pass he gave all the proper warnings, but the respondent either did not hear them or paid no attention. As a consequence the appellant was forced to the side of the road, and, when passing the respondent asked her why she did not turn out; to which she did not reply. When the appellant attempted to regain the travelled part of the highway, the respondent did not then turn to the right, as she might and should have done, and when passing her buggy, the rear fender of the motor grazed the front wheel of the buggy with sufficient force to loosen two spokes from the rim of the wheel. The appellant stopped his motor and asked a gentleman who occupied a rear seat next to the buggy, if the buggy was injured and was assured that it was not. The respondent then drove past the motor and shortly afterwards the motor repassed the buggy. The respondent did not intimate in any way that any injury had been done to the buggy, and I am satisfied that, at that time, neither the appellant nor respondent knew the buggy had been injured.

I assume that if the motor had merely touched the buggy in passing that would not be an "accident" within the meaning of the Act, because the Act contemplates that some one has sustained "loss or injury." Here it cost $2 to repair the buggy

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and the damage thereto was an accident within sec. 18. Is the appellant liable to conviction because he did not "return to the scene of the accident" and give the particulars required by that section when he did not know there had been an accident?

In Hardcastle's Statute Law, 3rd ed., 465, the law is thus stated:—

> Another important general rule with regard to the operation of penal statutes is that before a person can be convicted under a penal statute it is necessary to prove either that he knew that he was doing the prohibited act, or that it happened either in consequence of his personal neglect or without his having any lawful excuse.

And Maxwell (2nd ed. 115) thus states the law:—

> As *mens rea*, or guilty mind, is, with few exceptions, an essential element in constituting a breach of the criminal law, a statute, however comprehensive and unqualified it be in its language, is usually understood as silently requiring that this element should be imported into it, unless a contrary intention be expressed.

A Railway Act made the sending of certain dangerous goods (vitriol being one) without marking a criminal offence. The respondents received from N. cases containing vitriol and sent them to the railway without marking as required by the Act. They inquired of N. what the cases contained and were told they contained gun stocks and other goods of a harmless nature. The Court held the respondents could not be convicted because they did not know the goods sent were dangerous goods. Compton, J., said: "I am clearly of opinion that the respondents, though civilly liable, are not liable criminally."

In *Core* v. *James*, L.R. 7 Q.B. 135, the appellant, a baker, was convicted for using alum in his bread. The law absolutely prohibited the use of alum "under any colour or pretence whatsoever" upon pain of conviction. The Court set aside the conviction on the ground that the appellant did not know the alum was used in the bread. Hannen, J., said:—

> I think the meaning of sec. 8 is, that if the baker knowingly uses any forbidden ingredient he shall be liable to a penalty, but where there is an utter absence of knowledge it cannot be said that he uses the ingredient, for he does not know that it exists.

In *Nicholls* v. *Hall*, L.R. 8 C.P. 322, the appellant was convicted under the provisions of an order made pursuant to the Contagious Diseases Act, 1869. That order provided that where a person had in his possession an animal affected with a contagious disease, "he shall, with all practicable speed, give notice to a police constable of the fact of the animal being so affected."

Keating, J., said:—

> I am of opinion this conviction must be quashed. The question submitted is whether, in order to convict the appellant, it was sufficient to prove that the animals were affected by the contagious

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disease, and that the appellant gave no notice of their being so affected without evidence that he knew of their being so affected. . . . I am of opinion that knowledge is an essential ingredient of the offence. I do not see how, without knowledge, a person can fairly be said to act in contravention of an order worded as the one now before us is. The provision is that notice is to be given "with all practicable speed." I cannot understand how, on any reasonable construction of these words, it can be said that a man can neglect to give notice with all practicable speed without knowledge of the fact of which he is to give notice. It has been contended on behalf of the respondent that the Act is aimed at the prevention of a great public evil, and that if it is necessary to prove knowledge it will be difficult or impossible to give effect to its provisions, and many cases were suggested in which the statute might be evaded. . . This is a penal enactment, and we are bound, according to a well established principle of interpretation, whatever the consequences, to construe it strictly.

So in this case, I do not see how the appellant could "return to the scene of the accident" and give the particulars required by sec. 18 if he did not know, or have reason to know, there had been an accident.

At the hearing I was of the impression that where the respondent had the means of ascertaining if there was sufficient injury to the buggy to constitute an accident, this might be sufficient to sustain the conviction. I think, however, that means of knowledge, even where such means were neglected, is not sufficient. An Act provided that where government stores bearing the King's mark were found in the possession of any person, such person should be convicted, unless he produced at the trial an official certificate of the occasion of their coming into his possession. The Court for Crown Cases reserved, held that such person was not liable to conviction in the absence of proof that he knew, though he had reasonable means of knowing, that the goods bore the King's mark: *Reg.* v. *Sleep*, 1 L. & C. 44 [8 Cox C.C. 472, 4 L.T.N.S. 525]; see also *Hopton* v. *Thirlwall*, 9 L.T.N.S. 327.

The conviction will be quashed.

Conviction quashed.

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July 26.

John **HOOLAHAN** (petitioner for a writ of habeas corpus) v. Georges S. **MALEPART**, warden of the penitentiary of St. Vincent de Paul (respondent).

Quebec Court of King's Bench (Crown Side), Gervais, J. July 26, 1912.

1. HABEAS CORPUS (§ I C—13a)—WRONGFUL SENTENCE—HOUSE-BREAKING —CRIMINAL CODE, 1906, SECS. 459, 464.

A formal commitment of a person under art. 459 of the Criminal Code, 1906, for house-breaking, on a trial and conviction under art. 464 of the Code with having a house-breaking instrument in his possession, is illegal as being upon a charge different than that which was tried, and the prisoner will be discharged on *habeas corpus*.

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Statement

2. APPEAL (§ I C—26)—RIGHT OF COURT OF KING'S BENCH, QUEBEC, TO REFER TO COURT OF APPEAL—AMENDMENT OF SENTENCE.

The Quebec Court of King's Bench cannot, in lieu of quashing a sentence upon a writ of *habeas corpus* and discharging the prisoner, refer the matter to the Court of Appeal for amendment of the sentence, since that would amount to forcing an appeal upon the accused for the benefit of the Crown.

PETITION for release of prisoner under a writ of *habeas corpus* on the ground of the invalidity of the sentence and commitment.

L. Houle, for the petitioner.

J. C. Walsh, K.C., for the Crown.

Gervais, J.

GERVAIS, J.:—Counsel have been heard on behalf of the petitioner and of the Crown on the present proceedings, whereby the petitioner seeks to secure his release from St. Vincent de Paul penitentiary, and the proof of record has been carefully examined.

It is proved by the affidavits and documents filed, as well as by the admissions of the parties, that the petitioner was convicted under article 464 Criminal Code of having had in his possession a house-breaking instrument, to wit: a pinch bar, but that he was sentenced under article 459 Criminal Code, for house-breaking and condemned to six years' imprisonment in the penitentiary in which he now is.

Either the sentence is excessive by one year for having had in his possession said instrument, or that the sentence for housebreaking was so passed upon the petitioner when neither any charge of the kind, nor trial for the same had been had against him. In both alternatives, the sentence is therefore illegal.

The Crown has moved that sentence be referred to the Court of Appeal to be properly amended and passed by that tribunal.

Such a course would amount to forcing upon the petitioner a remedial appeal for the benefit of the Crown; it would constitute this Court, sitting under the Habeas Corpus Act, as a co-participant with a Court of Review or Appeal upon a sentence. Such a proceeding would go to defeat the only purpose of the appeal, which is to have it verified and ascertained by a Court of superior jurisdiction if an order or warrant of imprisonment or commitment has been issued in accordance with all the prescriptions and formalities of the Criminal Code or other law authorizing detention of any kind.

The detention of the petitioner in the penitentiary is illegal and null and void.

The writ of *habeas corpus* and the petition are sustained, and the sentence of the petitioner is quashed, and the immediate release of the petitioner is ordered.

Order for discharge.

BLANCHETTE v. LEVESQUE.

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Quebec Court of Review, Cannon, McCorkill and Pouliot, JJ.
March 29, 1912.

1. INSOLVENCY (§ I—3)—WHAT CONSTITUTES—ABANDONMENT OF PROPERTY—WHAT CONSTITUTES A TRADER—CHEESE MANUFACTURER.

A person who operates a factory in which he manufactures cheese and butter out of materials belonging to other parties, and who sells the product in his own name, receiving a commission thereon, is a trader, and is subject to the provisions of the Code of Procedure, Quebec, regarding abandonment of property.

Statement

THE judgment which is inscribed for review, and which is confirmed, was rendered by the Superior Court, Cimon, J., on February 8th, 1912.

The appeal was dismissed and the judgment of Cimon, J., affirmed.

L. Bérubé, for the contestant.
Lapointe & Stein, for the petitioner.

Pouliot, J.

Quebec. POULIOT, J. (translated):—The appellant is a manufacturer of butter and cheese. Having been required by the respondent petitioner to make an abandonment of his property for the benefit of his creditors, he contested the demand of abandonment, alleging that he was not a trader to whom the law of abandonment of property applied.

The whole question, therefore, is whether the appellant is a trader within the legal sense of the word, and whether he is to be considered as such for the purposes of abandonment of property.

It is recognized in law, that a trader is one who exercises acts of commerce and makes that his habitual profession.

Thaller, Droit Commercial, No. 60:—

La commercialité part de l'acte, frappe la personne, puis, en vertu d'un choc en retour, elle retombe sur les actes, afin d'en saisir un plus grand nombre. C'est la théorie de l'accessoire.

The purpose of the operation itself may be ostensible, and in that case it may be either civil or commercial, but if it is hidden and is done by a trader it is presumed to be commercial.

Sacré, Entreprise de Commerce, aux mots "Acte de commerce," 14:—

Le commissionnaire en marchandises est un commerçant qui loue ses services pour l'achat ou la vente de marchandises. C'est donc un véritable mandataire. En règle générale, tout mandat relatif a des opérations commerciales est un acte de commerce.

224.—"La commission est un contrat purement commercial, conférant mandat de faire des opérations commerciales, sujet à rendre compte."

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Alauzet I. Code de Commerce, 34:—

L'homme qui se rend intermédiare entre celui qui offre et celui qui demande, entre le producteur et le consommateur, dans un but de spéculation personnelle, est un commerçant.

Vincens (E.) Legislation Commerciale, p. 129:—

Le commissionnaire n'est qu'un commerçant qui se charge d'acheter ou de vendre pour les acheteurs, ou pour les vendeurs absents, lesquels lui donnent le soin d'agir à leur place; *il contracte sous son nom et s'engage en propre.* Ceux qui traitent avec lui le connaissent seul et ignorent communément s'il a, ou non, des commettants. Aussi, le commissionnaire est-il presque toujours négociant pour son propre compte. Quand il se tient a la commission, il est le moins entrepreneur des commerçants; il ne spécule, ni ne court de chances incertaines; il n'entreprend rien. Il prête son ministére a autrui pour une récompense fixe. Il est inutile de le distinguer du négociant proprement dit.

Does not Blanchette possess exactly the quality of a trader within the terms of these quotations? He is a mandatary who acts for the mandator, but who contracts in his own name and renders himself alone responsible towards third parties. He is, therefore, truly a commission agent.

The appellant Blanchette's quality of trader results from the fact that he is himself a manufacturer, and that he owns, as he admits himself in his evidence, several factories.

He is even a merchant since he not only makes and sells the butter which is made in a single factory, but carries on several of them. When he sells himself in his own name the butter he has manufactured, does he not do a commercial act, and must not his mandators so consider him?

Vincens (E.) Législation Commerciale, I., p. 122, says that parties towards whom traders have done commercial acts, can sue them under commercial jurisdiction.

But, says the appellant, even though my quality of trader results from my title of manufacturer, I cannot be considered a trader since there is, on my part, no element of speculation, which is necessary to render an act commercial.

To this objection we shall reply by several authors.

Sacré—Vo. Commerce, No. 24:—

Celui qui, sans acheter les marchandises premières, tient des ateliers où il occupe à la fabrication de celles qu'on lui confie, des ouvriers qu'il paie et sur le travail desquels il perçoit un bénéfice, est un commerçant.

De Villeneuve & Massé—I., Acte de Commerce, No. 22:—

L'artisan commerçant ou le manufacturier qui, dans la spéculation qu'il exerce sur les choses fabriquées par lui, ne manque point de faire entrer le prix que lui ont couté ses instruments de fabrication, fait un acte de commerce.

Gouget & Merger—I., Acte de Commerce, No. 105:—

Peu importe que l'entrepreneur soit propriétaire de la matière qu'il confie à ses ouvriers, ou qu'il la reçoive de ceux mêmes qui veulent la faire fabriquer, et qu'il se borne à se charger de cette fabrication moyennant un salaire convenu. Dans l'un comme dans l'autre cas, son but est de retirer un bénéfice des fonds qu'il avance pour le salaire des ouvriers qu'il emploie, et dont *il sous-loue en quelque sorte l'industrie*.—Il y a donc spéculation de sa part et conséquemment acte de commerce.

Applying these principles to the case in consideration, we must necessarily conclude that Blanchette, in receiving 1¼c. to 1¾c. per pound of cheese or butter made by him in his different factories, intended to perform acts of commerce, and that the prices stipulated for the manufacture, included the profit realized upon the product, because it can hardly be believed that Blanchette would take all the risks of manufacture without at the same time accepting the benefits thereof. Moreover, the fact admitted by Blanchette himself that he received a percentage upon the allotment which he prepared when once the sale of the cheese was effected, shews still further a commercial character of the act.

For all these reasons the appeal should be dismissed with costs, and the judgment of the Honourable Judge Cimon unanimously confirmed.

Appeal dismissed.

Re CONSTANTINEAU AND JONES.

Ontario High Court, Middleton, J., in Chambers. April 11, 1912.

1. COSTS (§ I—12)—CRIMINAL LIBEL—DISMISSAL OF CHARGE ON FAILURE OF PROSECUTOR TO APPEAR—COSTS OF PRELIMINARY ENQUIRY—CR. CODE (1906) SEC. 689.

Where an information was laid before a police magistrate for the publication of a defamatory libel and the accused was committed for trial but was discharged at the assizes because the prosecutor did not appear and an order was made in general terms by the court for the recovery by the accused from the prosecutor of his costs occasioned by the proceedings, the same to be taxed, such order was made under sec. 689 of the Crim. Code, 1906, and therefore included the costs of the preliminary inquiry as provided in such section.

2. APPEAL (§ II C—50)—JURISDICTION OF ONTARIO HIGH COURT TO INTERFERE WITH TAXING OFFICER'S DISCRETION—ABSENCE OF ANY TARIFF—CRIMINAL PROCEEDINGS—NO PROVISION IN CRIM. CODE (1906)—CRIM. CODE (1906), SEC. 1047.

Section 1047 of the Crim. Code, 1906, providing that any costs ordered to be paid by a court pursuant to the foregoing provisions of the Code shall in case there is no tariff of fees provided with respect to criminal proceedings be taxed by the proper officer of the court according to the lowest scale of fees allowed in such court in a civil suit, does not, by the mere introduction of the civil tariff, give the right of appeal which is found in civil cases, and therefore, no

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appeal in that regard being anywhere provided for by the Criminal Code, the Ontario High Court has no appellate jurisdiction to interfere with the discretion of the officer whose duty it is to tax such costs.

3. MANDAMUS (§ I C.—15)—WHEN IT MAY ISSUE—TO TAXING OFFICER—INTENTION OF COURT—JURISDICTION TO ISSUE MANDATORY ORDER.

Where, under an order by a Court for a prosecutor to pay the accused person his costs of the criminal proceedings which was made under sec. 689 of the Crim. Code, 1906, and therefore by the provision of such section included the costs of the accused's appearance on the preliminary inquiry, though made in general terms and not specially referring to such costs, the taxing officer acting upon the theory that the judge in his order did not intend to award such costs, declined to tax them, the Ontario High Court has jurisdiction to issue a mandatory order to the officer directing him to tax and to allow to an accused person such costs.

Statement

AN information was laid by Constantineau against Jones before the Police Magistrate at L'Orignal for the publication of a defamatory libel. Jones was committed for trial, and at the assizes was surrendered by his bail; but, the prosecutor not appearing, was discharged; and an order was made by LATCHFORD, J., for the recovery by the accused (Jones) from the prosecutor (Constantineau) of his (Jones's) costs occasioned by the proceedings, the same to be taxed.

A bill of costs was brought in before the Local Registrar covering the proceedings before the Police Magistrate, as well as those at the assizes; but the Local Registrar, upon taxation, disallowed entirely the costs of the proceedings before the Police Magistrate, and largely reduced the bill in respect of the costs incurred at the assizes.

Jones appealed from the taxation.

April 9, 1912. The appeal came on for hearing before MIDDLETON, J., in Chambers.

G. A. Urquhart, for the appellant.

H. S. White, for Constantineau, objected that there was no appeal from the taxation, as the proceedings were under the Criminal Code, and the provisions of the Consolidated Rules did not apply.

Middleton, J.

April 11, 1912. MIDDLETON, J. (after setting out the facts as above):—I think this objection is well taken. The section of the Criminal Code under which the order for payment of these costs was made is sec. 689.* It merely gives authority to direct payment of costs. Section 1047,† I think, is wide enough to

* 689. If the prosecutor so bound over at his own request does not prefer and prosecute such an indictment, or if the grand jury does not find a true bill, or if the accused is not convicted upon the indictment so preferred, the prosecutor shall, if the court so direct, pay to the accused person his costs, including the costs of his appearance on the preliminary inquiry.

† 1047. Any costs ordered to be paid by a court pursuant to the foregoing provisions shall, in case there is no tariff of fees provided with respect to criminal proceedings, be taxed by the proper officer of the court according to the lowest scale of fees allowed in such court in a civil suit.

apply not only to costs ordered to be paid under secs. 1044 and 1045, but to apply to all costs ordered to be paid under any of the earlier provisions of the Code. This section indicates that where there is no tariff provided in respect to criminal proceedings, costs shall be taxed according to the lowest scale of fees allowed in the Court in which the proceeding is had in a civil suit. Power is given under sec. 576 to the Court to provide by general rule for the costs to be allowed; but no tariff has been promulgated under the Code; and, therefore, the tariff applicable in civil proceedings, and provided by the Judicature Act and Rules, is applicable; but under the Code no appeal is given, nor is the right of appeal which is found in civil cases made to apply by the mere introduction of the civil tariff.

Upon the argument it was suggested that another remedy might be open to the applicant, in so far as the Taxing Officer has failed to allow anything for the costs incurred upon the preliminary inquiry.

I am quite clear that, in the absence of any appellate jurisdiction, I have no right to interfere with the discretion of the officer whose duty it is to tax these costs; but it seems to me to be equally plain that where the Taxing Officer has failed to discharge his function at all, and has failed to make any allowance for the costs of the preliminary inquiry, applicant has the the right to come to this Court to compel the officer to exercise his function; and it was arranged by counsel that, to save the expense of another application, this may be treated as a motion for a mandatory order, and that I should deal with the questions which would be open upon such an application.

The Taxing Officer has proceeded upon the theory that the trial Judge did not intend to award the costs of the preliminary inquiry, and that the language used in the judgment is not sufficient to award these costs. I have had the opportunity of consulting the learned trial Judge, and he tells me that it was his intention to make an unrestricted award of all costs over which he had any jurisdiction; and I think that the judgment adequately awards the costs of the preliminary inquiry.

The formal judgment entered recites the information before the Police Magistrate and the committal and the notice of discontinuance given by the complainant; and the award is "of the costs occasioned by the said proceedings."

In the second place, I think that, upon the true construction of sec. 689, where costs are awarded in general terms, these include the costs of the appearance on the preliminary inquiry. The word "including" is equivalent to, "which are to include." It would have been well, when the judgment was settled, to have avoided any question by following the precise words of the statute; but, when I find that the words are capable of the wider

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meaning, and that the learned trial Judge intended his judgment to have the wider meaning, I have no hesitation in giving to the words used a meaning which conforms to the actual intention.

The motion thus amended will be dealt with by determining that I have no appellate jurisdiction, and cannot, therefore, deal with the appeal, as an appeal; but a mandatory order will go to the local officer directing him to tax and allow to the applicant (Jones) his costs of the preliminary proceedings before the Police Magistrate. As success is divided, I make no award of costs.

Judgment accordingly.

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WOOD v. NEWBY.

Alberta Supreme Court. Trial before Scott, J. May 31, 1912.

1. MALICIOUS PROSECUTION (§ II B—16)—REASONABLE AND PROBABLE CAUSE—HOW SHEWN.

Reasonable and probable cause for the arrest of the plaintiff, a watchmaker, on a charge of having converted to his own use a watch left with him for repairs, is not shewn, in an action for malicious prosecution, where the only thing tending to shew any improper dealing with the watch was his statement to the defendant that he was leaving town and would leave all repair work with another person, and that he omitted to leave with him the watch in question.

2. MALICIOUS PROSECUTION (§ II B—17)—IMPLIED MALICE—ABSENCE OF REASONABLE AND PROBABLE CAUSE.

Malice may be implied in an action for malicious prosecution, where there was not reasonable and probable cause for the arrest of the plaintiff.

[*Quartz Hill Gold Mining Co.* v. *Eyre*, 11 Q.B.D. 674, specially referred to.]

3. TRIAL (§ III E 3—246)—MALICIOUS PROSECUTION—FUNCTION OF JUDGE AND JURY AT TRIAL—REASONABLE AND PROBABLE CAUSE—MALICE.

Whether there was reasonable and probable cause for the arrest of the plaintiff must be decided, in an action for malicious prosecution, by the trial Judge, while the question of malice is to be determined by the jury.

4. MALICIOUS PROSECUTION (§ II B—17)—MALICE—ARREST OF PLAINTIFF—REFUSAL OF DEFENDANT TO HAVE SUMMONS.

Malice, in an action for malicious prosecution, may be found from the facts that the defendant, without reasonable or probable cause, procured the arrest of the plaintiff on the ground that the latter, a watchmaker, who had removed from the town, had in his possession a valuable watch belonging to the defendant, and the latter did not take a summons for the plaintiff, as suggested by the magistrate, as he stated that he feared that if a summons was issued it would give the plaintiff an opportunity to escape, since, from such circumstances, it appeared that the defendant's desire was to recover the watch and not to punish the plaintiff.

5. MALICIOUS PROSECUTION (§ III—21)—HOW TERMINATION OF PROSECUTION MAY BE SHEWN—DISMISSAL OF CHARGE.

The termination of criminal proceedings before a magistrate is sufficiently shewn in an action for malicious prosecution where the records of such officer shewed that the charge against the plaintiff was dismissed with costs, and the testimony of the magistrate was to the same effect.

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6. PLEADING (§ I N—114)—AMENDMENT AT TRIAL—ACTION FOR MALICIOUS PROSECUTION.

An amendment may be granted, on the trial of an action for malicious prosecution, to strike out the word "feloniously" from the plaintiff's statement of claim, in respect of an allegation that the defendant charged the former with having feloniously stolen a watch, to conform with the information laid by the defendant charging the plaintiff with fraudulently and without colour of right converting it to his own use under sec. 347 of the Criminal Code, since the act so charged constituted the statutory offence of theft or stealing, whether or not it was a felony.

Statement

THIS is an action for damages for malicious prosecution. There was judgment for plaintiff.

H. H. Hyndman, for plaintiff.

Messrs. *Frank Ford*, K.C., and *W. B. F. Kelsey*, for defendants.

Scott, J.

SCOTT, J.:—As no evidence was adduced on behalf of the defendants the facts are undisputed. I find them to be as follows:

The plaintiff formerly resided and carried on business as a watchmaker and jeweller at Viking, Alberta. About October, 1910, the defendants, who are husband and wife, left with him a gold watch to be cleaned and regulated. Upon taking it apart he found that a wheel was worn out and that a new one would be required, and he then laid it aside in order to consult the defendants. About six weeks later the husband called, and upon being informed as to the condition of the watch, he decided to have a new wheel put in. The plaintiff thereupon sent an order to a Winnipeg firm for a new wheel, enclosing the old one as a pattern, but that firm, not having a wheel of that pattern in stock, were unable to supply it at the time. The defendants made enquiries from time to time about the watch and were informed by the plaintiff that the wheel had not been received. He left Viking about 10th August and went to Hardisty, about forty miles distant, where he has ever since carried on his business. When he left Viking he left the case of the watch in his work bench at Viking, where his wife remained for some time after he left there, but the works he took with him to Hardisty. Before his departure from Viking he inserted a notice in the local newspaper there to the effect that he had left all repairs with Hilliker Bros. there during his temporary absence, that all parties having repairs should call as early as possible and claim them, and that all work left with that firm would receive prompt attention. It does not appear, however, that the defendants saw this notice. About a week before plaintiff left Viking the male defendant called upon him and was informed that the wheel had not arrived. Plaintiff told him that he was leaving Viking the following week and suggested that he should put the watch together without the wheel, but Newby did not request him to do so nor did he make any demand for the watch, and

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in the evidence before the justice he admitted that he was quite satisfied of plaintiff's willingness to return the watch.

On 12th August, 1911, the defendants, accompanied by a constable of the Royal North-West Mounted Police, appeared before one Martin, a justice of the peace at Viking, and informed him that a watch had been left with the plaintiff for repair and that he had left the town. The justice told them that plaintiff's wife and family were in town and that one Hilliker, the postmaster, was his agent, and suggested that they should make enquiries from him before laying the information. Newby then left and returned about fifteen minutes later, stating that he could not obtain any satisfactory information about the plaintiff. The justice then drew up an information which was duly sworn to by Mrs. Newby, who was then the owner of the watch. That information is as follows:—

> That F. A. Wood, of Viking, between September 1st, 1910, and the twelfth day of August, 1911, at Viking, in the said Province, did fraudulently and without colour or right, convert to his own use a certain gold-cased watch, the property of complainant, of the value of over seventy dollars, contrary to sec. 347 of the Criminal Code.

At the time of the laying of this information a warrant was applied for either by one of the defendants or by the constable in their presence. The justice suggested that they should take a summons, but one of them stated that as the watch was a valuable one the issue of a summons would give the plaintiff a chance to get away. A warrant was then issued and delivered to the constable.

The plaintiff returned to Viking about eight days after he left. When he reached there he heard that a warrant was out for his arrest, and he went to the police barracks there to enquire about it. He was then arrested and taken before the justice who had issued the warrant and was then released on his undertaking to appear at the hearing which took place the next day. The charge was dismissed at the hearing.

Before leaving Viking plaintiff left with Hilliker certain watches and other articles which had been left with him for repair and gave Hilliker a list of them. The watch in question was not on the list. The defendants went to Hilliker before the hearing of the charge and enquired about it and the latter informed him that it had not been left by the plaintiff. He informed them that plaintiff's wife was in Viking and that he thought that he had gone to Hardisty and he advised him to communicate with him there. He also told him that he did not think that plaintiff was trying to do them out of the watch. It does not appear that the defendants went to plaintiff's wife to enquire about it.

In his evidence at the trial the justice stated that from what the defendants told him he thought there was a good case against

the plaintiff, but it does not appear that they told him anything beyond what I have already stated.

Counsel for the defendants moved to dismiss the action upon the following grounds:—

1. That the absence of reasonable and probable grounds had not been shewn.
2. That there is no proof of malice.
3. That it was not shewn that the criminal proceedings against the plaintiff had been terminated.
4. That the charge stated in the statement of claim to have been preferred against the plaintiff has not been shewn to have been preferred.

I hold that the defendants preferred and prosecuted the charge against the plaintiff without reasonable and probable cause. The only thing that would tend to lead anyone to suspect him of any improper dealing with the watch was his statement to Newby that he was leaving town, he would leave all repairs with Hilliker, and the further fact that he omitted to leave with him the watch in question; but that, to my mind, falls far short of constituting a reasonable and probable ground for preferring a criminal charge against him of converting the watch to his own use.

As to the second ground, malice may be implied from the want of reasonable and probable cause. Upon a trial by jury the question of the reasonable and probable cause is one which the trial Judge must decide, but the question of malice is one for the jury, and it seems that, for the purpose of arriving at a conclusion upon that question, but for that purpose alone, they may also consider the question of the existence of reasonable and probable cause.

In *Quartz Hill Gold Mining Co.* v. *Eyre*, 11 Q.B.D. 674, Brett, M.R., says at p. 687:—

> It was necessary that the plaintiffs should give evidence also that the defendant had acted maliciously. Whenever in an action for malicious prosecution the Judge holds that there is a want of reasonable and probable cause, there is evidence to go to the jury of malice. When there is no other evidence of malice except what the Judge has stated to be in his opinion a want of reasonable or probable cause, I incline to agree with Huddleston, B., and Hawkins, J., in *Hicks* v. *Faulkner*, 8 Q.B.D. 167, at pp. 174, 175, that upon the question of malice the jury are not bound by the holding of the Judge as to the absence of reasonable cause, but they may consider whether in their own view there was a want of reasonable or probable cause. But the plaintiffs might have relied upon other facts; and it appears probable that the defendant in presenting the petition to wind up the company was actuated, not by a desire to benefit the shareholders, but by an indirect motive, namely, a wish to get back the money paid by him for the shares. This would be evidence to go to the jury. The

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defendant might have met it in various modes; nevertheless there was evidence of malice to be considered by the jury, even if it consisted only of want of reasonable and probable cause.

In the present case it is shewn that the defendants applied for the issue of a warrant in the first instance on the ground that the watch was a valuable one, and if a summons were issued the plaintiff might get away. It thus appears that they were actuated not by a desire to punish him, but by an indirect motive, viz., a wish to recover the watch. This fact, coupled with the absence of reasonable and probable cause, constitutes sufficient ground for finding, as I do find, that there was malice on the part of the defendants.

I find that there was sufficient evidence of the termination of the proceedings against the plaintiff. The record of the proceedings before the justice was put in as evidence and it appears thereon that the charge was dismissed with costs, and, in addition to this, the justice in his evidence stated that he had dismissed it.

In the statement of claim it is alleged that the defendants charged the plaintiff with having feloniously stolen a certain watch, whereas the information laid by Mrs. Newby charged him with fraudulently and without colour of right converting it to his own use contrary to sec. 347 of the Criminal Code. Under that section the charge as laid in the information constitutes theft or stealing. It may be open to question, however, whether an offence under that section is a felony, but the use of the word "feloniously" in describing the charge in the statement of claim, might be treated as surplusage, but, if not, the claim should be amended by striking it out, such an amendment having been applied for.

The plaintiff claims $10,000 damages. He has not proved any actual damages, but it must be assumed that his character and reputation and probably his credit have suffered by the charge. It is not necessary for his vindication that he should be awarded a large amount in damages. I therefore give judgment in his favour for $250 with costs in the higher scale.

Judgment for plaintiff.

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Alberta Supreme Court. Trial before Harvey, C.J. March 8, 1912.

1. FRAUD AND DECEIT (§ IV—17)—PURCHASE BY AGENT OF PRINCIPAL'S PROPERTY—KNOWLEDGE OF PRINCIPAL—ABSENCE OF TAKING ANY ADVANTAGE.

An agent who purchased for himself property belonging to his principal, is not guilty of fraud, where the latter was aware of such fact and no advantage was taken of him.

2. TRIAL (§ V E—301)—RE-ARGUMENT AFTER TRIAL—OBJECTION THAT STATUTE OF FRAUDS NOT PROPERLY PLEADED RAISED FOR FIRST TIME—AMENDMENT OF PLEADINGS.

Upon an argument directed by the Court to be made upon a new question suggested after trial and pertaining to the defendant's counterclaim, the defendant's counsel cannot object that the Statute of Frauds which was relied on at the trial in the argument made there pertaining to the counterclaim, was not pleaded thereto but to another defence, where such counsel treated the plea of the statute as being raised on the counterclaim until he raised the objection on the new argument.

3. ESTOPPEL (§ III A—15)—FAILURE TO OBJECT AT TRIAL—IMPROPER PLEADING OF STATUTE OF FRAUDS—RAISING QUESTION ON RE-ARGUMENT—AMENDMENT OF PLEADINGS.

Where the defendant's counsel failing to take any objection on the trial to the fact that the Statute of Frauds was not pleaded to the counterclaim though he treated it as if it had been properly raised, his objection first taken thereto after trial on an argument directed by the court upon a new question suggested at the close of the trial, will be overruled and the plaintiff's pleadings will be deemed amended so as to raise such defence.

4. CONTRACTS (§ II E 5—99)—SUFFICIENCY OF WRITING—STATUTE OF FRAUDS—CONTRADICTORY TERMS OF PAYMENT.

Where the terms of payment stated in a memorandum of the sale of land are contradictory, the contract is within the Statute of Frauds.

5. SPECIFIC PERFORMANCE (§ I B—15)—ORAL AGREEMENT OF VENDOR TO REPURCHASE—STATUTE OF FRAUDS AS A DEFENCE—ACTION BY VENDEE FOR SPECIFIC PERFORMANCE.

An agreement of a vendor to repurchase land he agreed to sell, notwithstanding it is unenforceable because within the Statute of Frauds, constitutes a good defence to an action by the vendee for specific performance of the agreement for the sale.

[*Miles* v. *New Zealand Alfred Estate Co.* (1886), 32 Ch. Div. 266; *McGuiness* v. *Kennedy* (1869), 29 U.C.Q.B. 93; and *Eaton* v. *Crook* (1910), 3 A.L.R. 1, followed.]

6. CONTRACTS (§ V C—390)—SALE OF LAND—ORAL AGREEMENT TO RESCIND—SUFFICIENCY OF.

An agreement for the sale of lands may be rescinded by the parties by an agreement not in writing, notwithstanding an action could not be maintained thereon because the agreement is within the Statute of Frauds.

[*Goss* v. *Lord Nugent* (1833), 5 Barn. & Ad. 58, followed.]

7. CONTRACTS (§ IV E—367)—BREACH OF AGREEMENT TO RE-PURCHASE—STATUTE OF FRAUDS—DEFENCE IN ACTION FOR DAMAGE FOR VENDOR'S REFUSAL TO CONVEY.

An agreement of a vendor to repurchase land he had agreed to sell the plaintiff, although unenforceable because within the Statute of

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Statement

Frauds, will constitute a good defence to an action by the vendee for damages for the vendor's refusal to convey.

[*MacPherson* v. *Warner* (1893), 9 T.L.R. 397, specially referred to.]

THE plaintiff sues for specific performance of an agreement to purchase certain lots near the city of Calgary from the defendant for the sum of $641.25. The defendant alleges that it re-purchased the lots by agreement for $900, and counterclaims for specific performance of this agreement. The plaintiff replies that the second agreement does not comply with the Statute of Frauds and as a defence to the counterclaim alleges that the defendant purported to act as agent for the plaintiff and to be selling to a third party, whereas it was really trying to buy for itself, thereby committing a fraud on the plaintiff.

The action and counterclaim were both dismissed.

J. L. Jennison, for plaintiff.

W. T. D. Lathwell, for defendants.

Harvey, C.J.

HARVEY, C.J.:—The evidence and the argument at the trial had reference to the counterclaim, the plaintiff's right being apparently conceded unless the defendant could establish its right under the counterclaim and the plea of the Statute of Frauds was treated as being raised on the counterclaim, though in fact, it is only pleaded in reply to the defence. I decided that in the defence raised to the counterclaim the plaintiff failed, it having been established to my entire satisfaction that the plaintiff knew he was dealing with the defendant as purchaser and that no advantage whatever had been taken of him. I decided also that the defence of the Statute of Frauds, which had been argued, was a good defence to the counterclaim, and stated that the counterclaim would be dismissed, but without costs, owing to the nature of the defence and the conduct of the plaintiff, and consequently, as appeared to have been conceded that there would be, judgment for the plaintiff on the claim for specific performance, but without costs. Counsel for the plaintiff then suggested that though the agreement to sell back might not be a good agreement within the Statute of Frauds, it might be sufficient as a defence to the plaintiff's action. As this point had not been argued, I directed an argument on that point, staying the entry of judgment in the meantime.

On the new argument the point was raised that the Statute of Frauds is not pleaded to the counterclaim. I decide on this point that owing to the course of the trial the defendant should not be allowed to take such an objection now, and that the pleadings should be deemed to be amended so as to raise the defence which counsel assumed, until after the case was closed, was raised.

The evidence shews that for some time the plaintiff had been expressing dissatisfaction regarding the land which he had

bought from the defendant and that he asked its officers to try and sell it for him, giving them the price as $900, payable one-third cash and balance in 3, 6 and 9 months. Not finding a purchaser, the defendant decided to take the property back on plaintiff's terms and have no more trouble about it. Accordingly a cheque for $50 in favour of the plaintiff was issued and a receipt prepared setting out the terms as understood to be offered by plaintiff as "one-third cash and balance in three quarterly payments in 3, 6 and 9 months." These were sent to the plaintiff, who, instead of accepting the cheque and signing the receipt, came to defendant's office and began negotiating for better terms, when it was finally agreed that the terms should be one-third cash and the balance in two equal payments in 3 and 6 months. The plaintiff thereupon changed the receipt by striking out "and 9" and making it read "balance in three quarterly payments in 3 and 6 months," leaving it containing a contradiction in its terms. The agreement is clearly established by the evidence, but its terms are not set out in any memorandum in writing, in default of which it is declared by the 4th section of the Statute of Frauds that no action can be brought by which to charge a party to it. Can it then be set up as a defence to the plaintiff's action? In Browne on the Statute of Frauds, par. 122, it is stated:—

> As a general proposition . . . a verbal contract within the statute cannot be enforced in any way, directly or indirectly, whether by action or in defence.

But it is pointed out that there are certain exceptions to this rule, and the rule itself seems to rest chiefly on American authorities. In the notes to *Simons* v. *New Britain Trust Co.* (1907), 11 Am. & Eng. An. Cas. 477, authorities are cited for the view that an oral contract within the Statute of Frauds cannot be set up as a defence from fourteen States, while for the opposite view that it may be a defence authorities are cited from two States as well as from England and Ontario, the latter being *Miles* v. *New Zealand Alfred Estate Co.* (1886), 32 Ch.D. 266, and *McGuiness* v. *Kennedy* (1869), 29 U.C. Q.B. 93. In the former of these two cases, at p. 279, North, J., the Judge of first instance, states that an oral agreement may be set up by a defendant, and says:—

> It seems to me I should be enlarging that section of the Statute of Frauds if I said the plaintiff was entitled to set up the Statute of Frauds in answer to the case made by the defendants.

In appeal the only Judge who considered this point was Bowen, L.J., who agrees with the conclusion of North, J., and says at p. 296:—

> The only effect of the Statute of Frauds is to prevent the active prosecution of claims in the law Courts which are not supported by written evidence at the trial.

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In *McGuiness* v. *Kennedy* (1869), 26 U.C. Q.B. 93, the defendant had leased certain land to the plaintiff and at the time of the lease there had been an oral agreement that the defendant should have the crops then growing on the land. In a common law action brought by the plaintiff against the defendant for taking these crops, it was held that the oral agreement was a good defence and the plaintiff could not answer it by pleading the Statute of Frauds. At p. 97 of the judgment which was delivered by Richards, C.J., it is stated:—

> The agreement being under the fourth section of the Statute of Frauds is not void; it is still good. The defendant is not bringing an action on it; he is merely justifying his own act under a valid agreement though he could not in law bring an action on that agreement.

A decision in our own Court, *Eaton* v. *Crook* (1910), 3 A.L.R. 1, is to the same effect. The plaintiff sued defendant for a sum of money due under a contract. The defendant alleged and proved that there was an oral agreement that the plaintiff was to accept certain land in lieu of cash. It was held both at the trial and on appeal that this was a good defence and that the plea of the Statute of Frauds furnished no answer. That case is the exact converse of the present one. In it the plaintiff orally agreed to take land instead of money; in this he orally agreed to take money instead of land. The only difference is that in *Eaton* v. *Crook*, 3 A.L.R. 1, the agreements were contemporaneous, while in the present case the agreement sought to be set up as a defence is subsequent to the main or original agreement.

This suggests another aspect of the case under which the subsequent agreement may be considered as a discharge or evidence of abandonment of the original agreement, and on the authorities there appears no doubt that it may be considered for that purpose. The fact that it was in its terms a definite contract of sale for the lands appears to be immaterial, because any agreement which would discharge a contract for the sale of land would effect a resale of the purchaser's interest to the vendor and would, therefore, in effect be a contract for the sale of an interest in land, and so come within the 4th section of the statute.

In *Goss* v. *Lord Nugent* (1833), 5 Barn. & Ad. 58, Denman, C.J., in delivering the judgment of the Court of King's Bench, at p. 65 says:—

> It is to be observed that the statute does not say in distinct terms that all contracts or agreements concerning the sale of lands shall be in writing; all that it enacts is that no action shall be brought unless they are in writing, and as there is no clause in the Act which requires the dissolution of such contracts to be in writing, it should rather seem that a written contract concerning the sale of lands may still be waived and abandoned by a new agreement, not in writing

and so as to prevent either party from recovering on the contract which was in writing.

Browne, at par. 434 *et seq.*, points out that there is still a divergence of opinion as to the correctness of the above proposition in actions at law, but in par. 433 he points out that in actions in equity it is firmly established by many authorities

> that a parol discharge of a written contract within the Statute of Frauds is available to repel a claim upon that contract.

In *MacPherson* v. *Warner* (1893), 9 T.L.R. 397, the plaintiff had been engaged by the defendant for a term of five years. In the second year of the engagement the defendant assigned his business to a joint stock company when an oral arrangement was made whereby the plaintiff should receive only half the agreed salary until the profits of the company reached a certain sum, the defendant agreeing to make up the difference. The action was for the difference, either as balance of salary originally agreed to or in the alternative, as the difference subsequently agreed to be paid. Baron Pollock held with regret that the plaintiff could not succeed on either ground because of the second agreement not being in writing, as required by the 4th section, would not support the action and because the first agreement was not in effect, having been rescinded by the subsequent oral one. These cases are all considered in an article in vol. 9, Law Quarterly Review 366, as well as an unreported case to the same effect, *Todd* v. *Johnson* (1892), decided by Day and Charles, JJ. In that case the defendant owed the plaintiff £75 and it was orally agreed that he would accept £25 and a promise of employment for two years. Defendant refused to carry out the promise of employment and the action was brought for the balance of £50. It was held that the oral agreement was a good defence, though unenforceable for want of writing.

The author of the article expresses the opinion that the decisions I have referred to are in conflict with earlier decisions, but assumes

> that they are correct by reason of the altered views of the Judges as to the validity or invalidity of contracts that do not satisfy the requirements of the Statute of Frauds.

The earliest case mentioned is *Case* v. *Barber* (1681), 33 Car. II. Sir T. Raymond 450 (83 Eng. Rep. 235), in which it was held that a plea that a debt had been satisfied by an oral promise of a third party to pay a certain sum, was not a good plea, the promise being unenforceable. This case was cited in *Todd* v. *Johnson*, which appears to be a parallel case, but the Court refused to follow it and impliedly, if not expressly, overruled it. *Moore* v. *Campbell* (1854), 23 L.J. Ex. 310, and *Noble* v. *Ward* (1886), L.R. 1 Ex. 117, and (1867), L.R. 2 Ex. 135, the other earlier cases, are both on the 17th section of the Statute of

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Frauds and were cited in some of the later cases. The author in the commencement of his article states that *Brittain* v. *Rossiter* (1879), 11 Q.B.D. 123, is authority for the view,

> that notwithstanding the difference of the words "no action shall be brought," etc., in sec. 4, and "no contract . . . shall be allowed to be good," etc., in sec. 17, there is no difference in the effect of the two sections on contracts that do not satisfy their provisions.

It is true that in *Brittain* v. *Rossiter*, 11 Q.B.D. 123, though the 17th section was not in question, Brett, J., did say at p. 127:—

> In my opinion no distinction exists between the 4th and the 17th sections of the statute; at all events the contract is not void under the 4th section,

and Thesiger, L.J., at p. 132, after stating that an oral contract under sec. 4 is not void, says:—

> It may also be urged with some shew of reason that though there is a difference in language between the 4th and 17th sections of the Statute of Frauds, they are substantially identical in construction.

These statements are, however, at variance with the statements of many other Judges.

In *Moore* v. *Campbell*, 23 L.J. Ex. 310, which, as stated, was on the 17th section, in the judgment of the Court which was delivered by Parke, B., at p. 313, it is stated:—

> The agreement was void, there being neither note in writing nor part payment nor delivery and acceptance of part or all,

and in *Noble* v. *Ward*, L.R. 1 Ex. 117, and L.R. 2 Ex. 135, Bramwell, B., in the Court of Exchequer, said:—

> The expression "allowed to be good" in that section is not a very happy one, but whatever its meaning may be it includes this, at least, that it shall not be valid or enforced.

In the same case on appeal to the Exchequer Chamber, the judgment of the Court was delivered by Willes, J., who says:—

> The contract was invalid for want of compliance with the formalities required by sec. 17 of the Statute of Frauds,

and later he accepts the words I have quoted from the judgment of Parke, B. On the other hand, in *Brittain* v. *Rossiter*, 11 Q.B.D. 123, it was, as appears from the extracts quoted, distinctly held that the oral agreement within sec. 4 was not void, and this point came up directly in *Leroux* v. *Brown* (1852), 22 L.J. C.P. 1, and it was then held that sec. 4 applied to procedure only and not to the validity of the contract. Jervis, C.J., at p. 4 says:—

> I am of opinion that the 4th section does not apply to the solemnities of the contract, but to the proceedings upon it. . . . The 4th section looked at in contrast with the 1st, 2nd, 3rd and 17th leads to this conclusion.

In a footnote to the article in the Law Quarterly, to which

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I have referred, the learned editor, Sir Frederick Pollock, states that he is at a loss to understand how any Court below the House of Lords could disregard the unanimous and quite modern decision of the Exchequer Court in *Noble* v. *Ward*, L.R. 1 Ex. 117, and L.R. 2 Ex. 135. The answer to that appears to me to be that there is a clear distinction between the effect of sec. 4 and sec. 17, and that consequently *Noble* v. *Ward*, *supra*, is no authority for a similar case under sec. 4. I feel, no doubt, that *Leroux* v. *Brown*, 22 L.J.C.P. 1, would not have been decided as it was if the case had been under sec. 17 instead of sec. 4.

Even in *Noble* v. *Ward*, L.R. 1 Ex. 117 and L.R. 2 Ex. 135, it is suggested that if the oral agreement was clearly intended as a rescission of the original agreement, effect might be given to it for that purpose, which is the point now under consideration.

Under the authorities I have cited, by one of which I am bound, I am of opinion that the defendant ought to succeed in the main action, which is for equitable relief by way of specific performance, and even if the claim were amended to permit of a claim for damages being set up in the alternative in view of sec. 8 (11) of the Judicature Ordinance which provides that rules of equity shall prevail if they differ from the rules of law, the plaintiff would be in no better position, since the defendant has in no way repudiated the oral agreement, and even if it had, if *MacPherson* v. *Warner* is correctly decided, it is doubtful whether he could recover on it.

The action will be dismissed with costs. As already stated, the counterclaim is dismissed without costs.

Action dismissed.

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Alberta Supreme Court, Harvey, C.J., Scott, Simmons, and Walsh, JJ. June 22, 1912.

1. EVIDENCE (§ XII L—989)—NECESSITY OF CORROBORATING TESTIMONY OF AN ACCOMPLICE—DUTY OF COURT—VERDICT OF GUILTY—SETTING ASIDE FOR ABSENCE OF CORROBORATION.

While it is the duty of a court to caution the jury as to the danger of convicting the accused on the uncorroborated evidence of an accomplice and to advise them not to convict him on such evidence, yet, notwithstanding such caution and advice, a verdict of guilty rendered by the jury will be legal and cannot be set aside on the ground alone that there was no evidence corroborative of that of the accomplice.

[*Rex* v. *Stubbs* (1835), 25 L.J.M.C. 16; *Rex* v. *Frank* (1910), 16 Can. Crim. Cas. 237, 21 O.L.R. 196, 16 O.W.R. 50; *Rex* v. *McNulty* (1910), 17 Can. Crim. Cas. 26, 22 O.L.R. 350, 17 O.W.R. 611; *Rex* v. *Reynolds* (1908), 15 Can. Crim. Cas. 209, 1 Sask. L.R. 480, 9 W.L.R. 299, followed; *Rex* v. *Tate*, [1908] 2 K.B. 680; *Rex* v. *Beauchamp* (1909), 73 J.P. 224, referred to; *Rex* v. *Warren* (1909), 2 Cr. App. R. 194, 73 J.P. 359; *Rex* v. *Everest* (1909), 2 Cr. App. R. 116, 130, 73 J.P. 269, disapproved.]

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2. NEW TRIAL (§ II—8)—CRIMINAL TRIAL.—ERROR OF COURT—WRONG INSTRUCTIONS AS TO NECESSITY OF CORROBORATING TESTIMONY OF AN ACCOMPLICE.

A new trial of a criminal case in which the jury returned a verdict of not guilty will be ordered at the instance of the Crown where the trial judge, upon being asked by the jury after they had been out a while whether he had told them that it was not necessary to have before them evidence corroborative of that of the accused's accomplice, replied that he had not, and then went on to say, among other things, that the law did not require such corroborative evidence to be given though it was usual for judges to advise the jury that they should not convict on the uncorroborated evidence of an accomplice, and where the judge, after the jury had retired again, refused the request of the counsel for the Crown further to instruct the jury that if they saw fit to believe the evidence of the accomplice and to find a verdict against the accused upon it, they might do so, and such a verdict would be a lawful one, especially where the trial judge also said to the jury just after his statement above set forth that "of course the jury is generally supposed to pay some attention to what the Judge says upon a legal point."

Statement

CROWN case reserved at the instance of the Crown by Walsh, J., after the acquittal of the defendant upon a charge of attempting to procure an abortion.

James Short, K.C., for the Crown.
P. J. Nolan, K.C., for the defendant.

The judgment of the Court was delivered by

Harvey, C.J.

HARVEY, C.J.:—The accused was charged with an attempt to commit an abortion. The chief, if indeed not the sole, evidence was that of the woman on whom the act was attempted. The learned trial Judge, my brother Walsh, cautioned the jury, in accordance with the ordinary practice, in what would appear to be clear language, as to the danger of convicting on the uncorroborated evidence of an accomplice. After the jury had been in consultation for about an hour, they returned and asked the learned Judge if he had told them that it was not necessary for them to have corroborative evidence of the woman. In reply to this he further directed them as follows:—

> I did not say that. I evidently failed to make myself as clear as I should to the jury on this point, so I think, perhaps, I had better tell you again very briefly what I did say and what I meant. I told you that there is no absolute rule of law, no statute, which requires that, in such cases as this, corroborative evidence of an accomplice should be given; but that it is usual for Judges to advise the jury that they should not convict on the uncorroborated evidence of an accomplice; and, of course, the jury is generally supposed to pay some attention to what the Judge says upon a legal point. You, perhaps, misunderstood me about corroboration not being required in this case, because I mentioned the fact that there was no statute which made corroboration necessary. It is a rule of evidence which is adopted by the courts, the idea being, no doubt, that it is unsafe to convict on the uncorroborated evidence of an accomplice; and that is as far as I went.

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After the jury had again retired, counsel for the Crown asked that the jury be instructed that, if they saw fit to believe the evidence of the woman Cronsberry above, and to find a verdict against the accused upon it, they might do so, and that such verdict would be a lawful verdict.

This the trial Judge refused to do. The jury, after further consideration, rendered a verdict of "not guilty."

At the instance of the Crown counsel, the trial Judge has reserved for the opinion of this Court the question whether he was in error in refusing to instruct the jury in accordance with the request of the Crown counsel.

Ever since the case of *Rex* v. *Stubbs* (1835), 25 L.J.M.C. 16, until within the last few years, there appears to have been no difference of opinion on the part of Judges and text-book writers on this subject; and that opinion was, that the Judge should caution the jury as to the danger of convicting, and advise them not to convict, on the uncorroborated evidence of an accomplice; but that, if, notwithstanding such caution and advice, a verdict of "guilty" were rendered, such verdict would be legal and a conviction must be made. Even after the establishment of the Court of Criminal Appeal, this was declared still to be the rule by Lord Alverstone, in *Rex* v. *Tate*, [1908] 2 K.B. 680, and *Rex* v. *Beauchamp* (1909), 73 J.P. 223; but in the same year, in *Rex* v. *Warren* (1909), 2 Cr. App. R. 194, 73 J.P. 359, and *Rex* v. *Everest* (1909), 2 Cr. App. R. 116, 130, 73 J.P. 269, it was declared that, as a matter of law, a conviction should not be made on the unsupported evidence of an accomplice. It is quite clear that authority cannot be given to these later cases to alter the well-established rule of law in this country; and in *Rex* v. *Frank* (1910), 16 Can. Crim. Cas. 237, 21 O.L.R. 196, 16 O.W.R. 50, the Court of Appeal for Ontario declined to follow them, and again declared the law to be what it had so long been supposed to be, as they did again in *Rex* v. *McNulty* (1910), 17 Can. Crim. Cas. 26, 22 O.L.R. 350, 17 O.W.R. 611.

The Supreme Court of Saskatchewan, also, in *Rex* v. *Reynolds* (1908), 15 Can. Crim. Cas. 209, 1 Sask. L.R. 480, 9 W.L.R. 299, decided to the same effect. This was also a case of abortion; and the learned trial Judge, Chief Justice Wetmore, directed the jury that, as the only evidence against the prisoner was that of an accomplice, they ought not to find him guilty; but that, if they did, the conviction could not be set aside. The prisoner was found guilty, and the conviction was sustained by the unanimous judgment of the Court.

It is to be observed that all of these cases are cases in which the claim is made in behalf of the accused that the charge was prejudicial to his rights; and all the cases to which reference has been made are of the same character.

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There is no doubt that the charge under consideration is entirely unobjectionable, looked at from the accused's point of view; and, if nothing had happened between the time of the first direction and the verdict, I would be of opinion that no objection could be taken to it on behalf of the Crown. Indeed, no objection is taken to anything that was said, but simply to what was not said. The jury, by the question asked, having indicated that they or some of them were not clear as to their powers, asked for further advice. It was then, I think, the duty of the Judge to make clear to them that they had power to convict without corroboration.

His first answer to them was that he did not say that they could do this. That, no doubt, would make the greatest impression on their minds; and, though what he said in continuation was strictly correct, the suggestion that they should follow his advice on a question of law, thereby indicating or at least suggesting that it was really a matter of law and not one of wise discretion, might very easily have left them in doubt as to their powers in the matter; and the Crown was entitled to have that doubt removed, as would very easily have been done if the simple direction asked for had been given, as was done in *Rex* v. *Reynolds* (1908), 15 Can. Cr. Cas. 209, 1 Sask. L.R. 480, 9 W.L.R. 299, *supra*.

It must be apparent to every one that there are degrees of guilt in the act of an accomplice, and conditions varying the weight to be attached to his evidence. The theory is, that an accomplice, being an admitted criminal, is not entitled to much credit, especially as his interest to shield himself at the expense of some one else is so great. Take, however, the instance of a charge of incest against a father in respect of a daughter. The evidence against the accused must necessarily implicate the accomplice, and the horror of such an admission is such that the natural tendency would be to bury rather than declare the crime. The charge of abortion which we have here has some of the same qualities.

It is apparent, therefore, that the danger of relying on the unsupported evidence of an accomplice is much greater in some cases than in others; and the weight of such evidence should, therefore, be greater in some cases than in others. The weight of evidence is always a question for the jury, and the jury is entitled to know clearly and unequivocally what is within its province, when it is important, as it was here; and as, in my opinion, there is good reason to think that they did not fully understand their powers in this case, and that the Crown had a right to have the explanation asked for made, I am of opinion that there should be a new trial; and, under the authority of sec. 1018 of the Criminal Code, 1906, I would direct such new trial.

New trial ordered.

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Quebec Court of King's Bench (Crown Side), Gervais, J. July 16, 1912.

1. APPEAL (§ I C—25)—RIGHT OF APPEAL—SECTION XV. OF THE CRIMINAL CODE, 1906, MADE APPLICABLE BY PROVINCIAL STATUTE—JURISDICTION OF COURT OF KING'S BENCH, QUEBEC.

Since sec. 3982 (*j*) of ch. 35, of 1 Geo. V. of Quebec, regulating the sale of cocaine, morphine and their compounds, expressly provides that sec. XV. of the Criminal Code regulating appeals should apply to prosecutions thereunder, the Court of King's Bench has, by virtue of such Act, as well as under judicial authority, jurisdiction to entertain an appeal from a conviction under such Act.

[*The King* v. *Bigelow*, 8 Can. Cr. Cas. 132; *The King* v. *McLeod*, 12 Can. Cr. Cas. 73; *Scottstown Corporation* v. *Beauchesne*, 5 Que. K.B. 554; *Superior* v. *City of Montreal*, 3 Can. Cr. Cas. 379; sub-sec. 27 of sec. 91 of British North America Act, 1867; sub-sec. 14 of sec. 92 of the same Act, and sec. 749 of the Criminal Code, specially referred to.]

2. COURTS (§ I C 2—60)—INQUIRY INTO QUESTION OF WHETHER A PROVINCIAL ACT CONFLICTS WITH A DOMINION ACT.

The Court of King's Bench, Quebec, may, on its own motion or on behalf of any person interested, in a matter properly before it, determine whether a Provincial Act conflicts with an Act of the Dominion Parliament.

3. CONSTITUTIONAL LAW (§ I A 3—39)—PROVINCIAL ACT REGULATING SALE OF COCAINE AND MORPHINE—SUBSEQUENT ACT OF DOMINION PARLIAMENT DEALING WITH SAME SUBJECT.

If the enactment of the Provincial Parliament of Quebec, of 1 Geo. V. ch. 35, regulating the sale of cocaine, morphine, or their compounds, and providing a punishment for violations thereof, is not void because it is criminal legislation exclusively within the province of the Dominion Parliament, it was rendered ineffectual by the subsequent enactment by the latter body of 1 and 2 Geo. V. ch. 17, prohibiting the use or sale of such drugs, since the Provincial Act was in contravention to and incompatible with the Dominion Act.

[*Regina* v. *Wason*, 17 Ont. A.R. 221; *Fielding* v. *Thomas*, [1896] App. Cas. 600; *The Manitoba Liquor Act Case*, [1902] App. Cas. 73; *Local Prohibition Case*, [1896] App. Cas. 348; and sub-sec. 27 of sec. 91 of the British North America Act, 1867, specially referred to.]

4. CONSTITUTIONAL LAW (§ I G—140)—POWERS OF THE DOMINION PARLIAMENT IN RESPECT TO DECLARATIONS AS TO WHAT IS A CRIME—B.N.A. ACT, 1867.

Under the Confederation Act of 1867 it is within the power of the Dominion Parliament to declare any act a crime which it may consider necessary to so characterize.

5. INDICTMENT, INFORMATION, AND COMPLAINT (§ II F—55)—AMENDMENT—COMPLAINT LAID UNDER VOID PROVINCIAL ACT—SUBSEQUENT ACT OF DOMINION PARLIAMENT—PROHIBITING SALE OF COCAINE.

A complainf under ch. 35, of 1 Geo. V. of Quebec, which prohibits the sale of cocaine, morphine or their compounds, except to wholesale dealers, physicians, druggists, dentists, veterinary surgeons, or the holders of physician's prescriptions, cannot be amended, upon such Act being held void because in conflict with the subsequent enactment of the Dominion Parliament, 1 and 2 Geo. V. ch. 17, which makes it a crime to sell, take, or have in one's possession cocaine, without lawful excuse, so as to set out an offence under the Dominion

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Act, since the effect of allowing such amendment would be to change the nature and gravity of the offence charged in the original information.

[*The King* v. *Hayes*, 6 Can. Cr. Cas. 357; *Reg.* v. *France*, 1 Can. Cr. Cas. 321; *The King* v. *Lacelle*, 10 Can. Cr. Cas. 229; *The King* v. *Clark*, 9 Can. Cr. Cas. 125; *Reg.* v. *James*, 12 Cox Cr. Cas. 127; *Reg.* v. *Norton*, 16 Cox Cr. Cas. 59; *Reg.* v. *Carr*, 26 L.C.J. 61, referred to.]

Statement

THE first case, *Dufresne* v. *The King*, is an appeal from a judgment of the Recorder's Court, Montreal, rendered December 4, 1911, condemning appellant to one month in prison, and to a fine of $200, or in default of payment of same, to a further term of two months' imprisonment "for having, on the 18th November, 1911, in the said city, unlawfully sold cocaine to a person not coming within the category of those mentioned in paragraphs 1 and 2 of sec. 3982*a*, ch. 35, 1 Geo. V. (Que.) to wit: to Edward Walker, carter, of the said city."

The second case, *Campeau* v. *The King*, is an appeal from a judgment rendered by the same Court on the same day, condemning appellant to one month in prison, and to a fine of $100 and to the payment of the costs of the informer, Octave Charland, amounting to $6.70, or in default of payment of same, to a further term of one month's imprisonment, for having, on the 21st November, 1911, sold cocaine, under similar conditions, in violation of said Act, to Aimè Saint-Pierre.

The third case, *Campeau* v. *The King*, is an appeal from a judgment rendered by the same Court, on the same day, condemning appellant to a fine of $200 and to the costs of the informer, amounting to $34.80, or in default of payment of same, to two months' imprisonment, in addition to the prison terms given in the preceding case, for having, on the 24th November, 1911, sold cocaine, under similar conditions, in violation of sec. 3989*d*, ch. 35, 1 Geo. V. (Que.) to Aimè Saint-Pierre.

The fourth case, *Labranche* v. *The King*, is an appeal from a judgment rendered by the same Court on January 25, 1912, condemning appellant to three months' imprisonment, and to a fine of $200, or in default of payment of same, to a further term of two months in prison for having, on the 23rd December, 1911, sold cocaine, under conditions similar to those related in the first case, to Tony Gravelon.

J. C. Walsh, K.C., for the Crown.

Gonzalve Desaulniers, K.C., *N. K. Laflamme*, K.C., *J. A. St. Julien*, K.C., and *J. O. Gagnon*, for the appellants.

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GERVAIS, J.:—Having heard counsel, both on behalf of the Crown and on behalf of the appellants, having taken note of certain admissions made by one side and by the other and having examined the record in each case and the documents filed, by virtue of the consent of the interested parties, given for them by

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their respective counsel at the hearing of the arguments, that the proceedings and evidence should be common to the four appeals and that one judgment should decide the issues upon these four appeals, the following opinion of this Court is to be considered as applicable to each of the four cases now before it for adjudication.

The four suits, now in appeal before this Court, were instituted in pursuance of the above-mentioned provincial statute, 1 Geo. V. (Que.) ch. 35, being an Act to regulate the sale of cocaine, morphine and their compounds.

The first question to be decided is whether the declinatory exception *ratione materiae*, raised by the respondent, is well founded. In support of its exception, it has been argued on behalf of the Crown that no appeal lies to this Court from the decision of the Recorder's Court in these cases, and the reason given is that the sentences of the appellants were for infractions of a provincial law, the necessary consequence being that this Court, sitting as an appellate tribunal, should not take judicial cognizance of that law. It is to be immediately observed, however, in this respect, that section 3982*j* of the Act provides that "the provisions of part XV. of the Criminal Code shall apply, *mutatis mutandis*, to prosecutions taken under this chapter," and no exception is made of those sections of part XV. which regulate the appeals which may be taken in cases coming within the purview of that part.

Formal and positive jurisdiction is given this Court by the legislature to sit upon the present appeals, and, in view of this, this Court cannot avoid a law which provides the procedure and the tribunal for the decision of actions taken for the violation of statutory enactments which it creates, nor the adjudication of appeals which may ensue. In any event, any such appeals are subject to the conditions provided, to meet the requirements of each case, by provincial legislative authority which excludes the authority of the Parliament of Canada. On this point, reference may be had to sub-section 27 of section 91 of of the British North America Act, 1867, to sub-section 14 of section 92 of the same Act, and to section 749 of the Criminal Code.

The competency of this Court to hear and determine the present appeals is also derived from judicial authority. *Vide*: *The King* v. *Bigelow*, 8 Can. Cr. Cas., p. 132; *The King* v. *McLeod*, 12 Can. Cr. Cas., p. 73; *Scottstown Corporation* v. *Beauchesne*, 5 Que. K.B., p. 554; *Superior* v. *City of Montreal*, 3 Can. Cr. Cas., p. 379. The declinatory exception is dismissed.

—The second question to be decided revolves upon the validity of the provincial statute, already cited, which was sanctioned the 24th March, 1911. For the appellants it has been argued

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that that statute is unconstitutional—and the point was discussed at the outset of these proceedings—for the reason that the Act 1 and 2 Geo. V. ch. 17, of the Parliament of Canada, and sanctioned on the 19th May, 1911, had for object the prohibiting of the unauthorized use of opium and other drugs.

Under our law, the knowledge of conflict between constitutional legislative bodies may be raised by the Court of its own motion or on behalf of any person interested. That argument having been advanced in these proceedings and the claim having been made, on behalf of the appellants that the provincial Act is inapplicable by reason of unconstitutional impotence due to the fact that a subsequent Dominion Act was adopted and that the latter has predominating authority, notice was given to the Attorney-General of the province, in pursuance of an order of this Court on the 25th June last (1912), that the provincial Act in question was being attacked as unconstitutional, and the Crown prosecutor and the clerk of this Court were charged with the duty of notifying the Attorney-General to enable him to take such steps as he might deem advisable under the circumstances. The Court has, this day, been apprised by the Crown prosecutor and the clerk of this Court that a reply has been received from the Attorney-General and it is that no other conclusion can be arrived at than to deny the competency of this Court to hear and determine the present appeals. The Court has, however, already declared that it is competent to decide these appeals, and will now proceed to discuss the arguments advanced on behalf of the appellants.

The appellants deny that the Provincial Act has any legislative effect whatever, the reason given being that a provincial legislature has no power to enact criminal or penal laws properly so called, and, in any event, that there was tacit disallowance of the said Provincial Act when the Parliament of Canada passed a law of its own controlling the sale of the drugs in question. This being so, there is a conflict of jurisdiction, and the Dominion Act should predominate.

The legislative authority or competency of the Parliament of Canada or of that of the province of Quebec to legislate upon any one of the subjects recited in the Constitutional Act of 1867, and therein declared to be either within the authority of Parliament or of the provincial legislatures, is, when there exists doubt or a conflict of authority, determined by the primary and principal object of the Acts in question.

The object of the present Provincial Act is to prohibit, under penalty, the use of cocaine by those who do not require it, that is to say, otherwise than as a medicine, an exception being made, however, in favour of wholesale dealers and certain professions.

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By its nature, the statute must be considered more a punishment than a regulation. Its object is to provide against possible violations of its provisions, in the interest of public morals, rather than to control the sale of cocaine, in the interest of those trading in that drug. The end which it proposes is the suppression, in the province of Quebec, of the dangerous use of cocaine, and not the securing of the free enjoyment of the rights of ownership in the drug. Moreover, the sale of cocaine is controlled by the Pharmacy Act of the province of Quebec, the pertinent provisions of which are incorporated in sections 5007, 5008, 5009, 5014 and 5018 of the Revised Statutes of Quebec.

The purport and wording of 1 Geo. V. (Que.) ch. 35, sanctioned on the 24th March, 1911, make it clear that it proposed, by imprisonment, fine or search warrant, to suppress the immoral use of cocaine, or other drugs, that is to say, the law is to be enforced under pain of criminal proceedings or of fines. But, at the same time, it is clear that the provincial statute is covered from every point of view, by the Dominion Act, sanctioned the 19th May, 1911, the latter, in any event, being much more comprehensive and effective.

Under the Dominion Act, Parliament declares that the sale, use or mere possession of such drugs is a crime which is punishable by imprisonment or fine. It is clear, therefore, that the Dominion Act goes much further than the provincial statute in prohibiting the immoral and harmful use of the same drugs, which means, "without lawful or reasonable excuse." The provincial law seeks the same end, merely by providing punishment for anyone who sells the drugs in question. It does not enact any penalty from the person using the drug or having it in his possession.

It is admitted, under the Confederation Act, supported by decisions of the Courts, that the Parliament of Canada has the right to define as a crime any act which it considers it should so define.

The Dominion Act of the month of May 1911, adopted by the Parliament of Canada, within the limits of its legislative powers, must therefore be considered as superior to the Act adopted by the legislature in the preceding month of March, whether it be viewed as a police regulation which is within the concurrent authority of Parliament and of the legislature of Quebec, or whether it is to be regarded as a criminal statute, control of which is exclusively within the legislative powers of the Parliament of Canada.

If the provincial statute was not without effect because it was constitutional and because, when adopted, it was within the prerogatives of the provincial legislature to pass it, in any event

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it became so from the fact that it was in contradiction and incompatible with a subsequent Dominion statute. Reference is made to sub-section 27 of section 91 of the British North America Act, 1867, and to the following decisions: *Regina* v. *Wason*, 17 Ont. App. Rep., p. 221; the judgment of the trial Court is reported in 17 Ont. Rep., p. 58; *Fielding* v. *Thomas*, [1896] App. Cas. 600; *The Manitoba Liquor Act Case*, [1902] App. Cas. 73; *Local Prohibition Case*, [1896] App. Cas. 348.

The Quebec provincial statute, 1 Geo. V. ch. 35, is, therefore, without application in the present cases, if not because it is unconstitutional, then, at least as being contrary and incompatible with the Dominion Act.

The next question to be considered is that evolved from the application which has been made for permission to amend the complaints.

In this connection it is to be immediately observed that these were all made, in virtue of the provincial statute, long subsequent to the coming into force of the Dominion Act. Both statutes provide means to suppress the sale of cocaine and other drugs therein mentioned.

Offences against the statutes in question, are not, from their nature of gravity, identical. In each of the complaints the offence committed is described with care, according to the provisions of the provincial statute, and mention is made of the sections under which each complaint is made. The Crown has now moved the Court for the purpose of securing permission to amend the different complaints in such a way that the description in each of them of the offence alleged shall correspond with the definition of an offence against the Act as contained in the Dominion statute and which prohibits the sale of cocaine "without lawful or reasonable excuse." The Dominion Act provides that it is a crime to sell, take, have in one's possession, cocaine, without such excuse; while the provincial statute declares that no one shall sell the drug, unless it be to a wholesale dealer, to a physician, a druggist, a dentist, a veterinary surgeon, or to the holder of a prescription of a practising physician.

To permit the amendment would be equivalent to substituting for another the statement that an offence has been committed. It would mean replacing in each complaint the words "for having sold cocaine to a person other than a physician or a druggist, or a dentist, or a veterinary surgeon, or the holder of a prescription of a physician or a dentist, or a wholesale dealer," by the words "for having sold cocaine without lawful or reasonable excuse. The words "without lawful or reasonable excuse," which are an essential element of the offence, have a wider meaning, according to the Dominion Act, than the words which, under the provincial statute, create certain exceptions to the application

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of the law in favour of certain professions and of wholesale dealers.

In each of the actual complaints now before the Court the greater portion of the essential elements of the offence to be embodied in the proposed new complaints do not exist. Leave will not be granted to amend an information or complaint, which would have the effect of changing the nature or gravity of the offence, in a criminal proceeding had either before a jury or without a jury, as in cases susceptible of trial under the speedy or summary trials Acts.

Even if every expression in the complaints which refers to the provincial statute were struck out, the complaints would still be faulty, because there would be no direct description of the nature and gravity of the offence as defined by the Dominion Act.

To accede to the present application for permission to amend the complaints would have the effect of taking the appellants by surprise and would cause them serious prejudice, inasmuch as the appellants have an interest and the right to deny to this Court the power to prevent them from relying upon any possible prescription, as would result if they were to be condemned by a judgment upon amended complaints which were served upon them more than six months before. The Court is without authority in thus rendering retroactive the consequences of a complaint only recently made legal in the place and stead of a former complaint which was null and void. To proceed in that direction would be a violation of the rule of law which requires that the complaint is the basis of any proceedings in the Courts of law, such proceedings themselves interrupting prescription. Reference is made to 654, 753, 754, 839, 889, 890, 898, 1124 C.C. and to the following decisions of the Courts: *Reg.* v. *Morrison*, 16 N.B.R., p. 682; *Reg.* v. *Wright*, 2 F. & F., p. 320; *The King* v. *Hayes*, 6 Can. Cr. Cas., p. 357; *Reg.* v. *France*, 1 Can. Cr. Cas., p. 321; *The King* v. *Lacelle*, 10 Can. Cr. Cas., p. 229; *The King* v. *Clark*, 9 Can. Cr. Cas., p. 125; *Reg.* v. *James*, 12 Cox Cr. Cas., p. 127; *Reg.* v. *Norton*, 16 Cox Cr. Cas., p. 59; *Reg.* v. *Flynn*, 18 N.B.R., p. 321; *Reg.* v. *Waters*, 1 Den. Cr. Cas., p. 356; *Reg.* v. *Carr*, 26 L.C.J., p. 61; *Reg.* v. *Lynch*, 20 L.C.J., p. 187.

Permission for leave to amend the complaints is denied.

Coming now to a discussion of the merits of these four appeals, it is to be observed that they have all been taken under the authority of the provincial statute, and, in the opinion of this Court, as above recited, the law has never had any legal existence. It follows that the complaints in question are absolutely null and void and they have never had any effect whatever. It therefore, becomes unnecessary to further proceed with the hearing of these complaints upon the present appeals.

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Each one of the appeals is allowed; the complaints are declared to be non-existent, and the appellants are discharged. The Court reserves, however, to whom as of right, the faculty to institute against the appellants any action under the provisions of the Dominion Act, if reason there be for it. The present judgment is delivered by the Court in each one of these four appeals.

Appeals allowed.

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BRODERICK v. FORBES.

Nova Scotia Supreme Court, Trial before Sir Charles Townshend, C.J., at Amherst, June 27, 1912.

1. EVIDENCE (§ XII B—929)—SUFFICIENCY OF UNSATISFACTORY EVIDENCE—ASSESSMENT OF DAMAGES.

The Court will not be deterred, by the fact that the evidence is, from the nature of the case, uncertain and unsatisfactory, from an attempt to assess damages where some damages have been suffered.

[*Chaplin* v. *Hicks*, [1911] 2 K.B. 786, followed; *Williams* v. *Woodworth*, 32 N.S.R. 271, specially referred to.]

2. DAMAGES (§ III K 1—206*a*)—MEASURE OF COMPENSATION—UNCERTAINTY OF FIXING AMOUNT—ANIMALS TRESPASSING.

Where several animals, belonging to different owners, have at various times trespassed upon the plaintiff's land, and the whole damage done by all of them can be ascertained, but the defendant's animal has sometimes been among those trespassing and sometimes not, and there is no proof that any particular damage was done by any particular one of the animals, the Court will, nevertheless, assess the damages against the defendant as best it can.

3. ANIMALS (§ I C 1—26)—LIABILITY FOR INJURIES BY TRESPASSING ANIMAL—HUSBAND AND WIFE—TITLE IN WIFE.

A husband is responsible for the damages caused by the trespass of a cow which is kept in his custody and control and of the use of which he gets the benefit although his wife may have the title or ownership of same.

Statement

ACTION for damages for trespasses by defendant's cow upon the plaintiff's farm.

The defendant's cow had trespassed frequently on plaintiff's premises. Other cattle, sometimes two and sometimes as many as ten or twelve, also entered plaintiff's premises, sometimes in common with and sometimes in the absence of defendant's cow. The whole damage done by all the animals was in the opinion of some witnesses as high as $200, but there was no proof that any particular damage was done by any particular one of the animals.

The Court held that plaintiff was entitled to more than nominal damages.

Judgment was given for the plaintiff for $30 damages.

J. L. Ralston and *I. S. Ralston*, for defendant.
F. L. Milner and *V. B. Fullerton*, for plaintiff.

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BRODERICK v. FORBES.
Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—This action is for trespass committed by defendant's cow in the years 1909-1910 and 1911 in breaking into plaintiff's cultivated field and damaging and destroying his crops. It is admitted that the district in which the trespasses were committed is a closed district in which it is unlawful for cattle to be at large. The trespasses were proved clearly and defendant's knowledge of the fact is also proved and considerable damage shewn in each year. The defendant denied ownership of the cow, asserting that it belonged to his wife, and evidence was given to prove that she acquired the cow from her daughter in reward for wages and services rendered to her. The cow was kept and used on defendant's premises, and I am of opinion that whether the wife was owner or not he is responsible for damages done by the cow while in his custody and use. It is also doubtful whether the cow did not become his property on being so acquired.

The question of how properly to assess the damages is rendered difficult by the fact that several other cows were trespassing and injuring plaintiff's crops at the same time.

In our own Court in *Williams* v. *Woodworth*, 32 N.S.R. 271, a similar question arose in the case of a number of dogs worrying sheep and the judgment below was sustained.

I think it best to follow the decision in *Chaplin* v. *Hicks*, [1911] 2 K.B. 786, and do the best I can in fixing the damages when the evidence is necessarily so uncertain and from the nature of things unsatisfactory. From a consideration of all the facts in evidence I think thirty dollars will be a fair sum to award plaintiff—possibly it is less than he should get in view of defendant's conduct in persistingly allowing his cow to run at large, but the evidence is too loose and uncertain to justify me in giving a larger amount. Plaintiff will therefore have judgment for thirty dollars damages and costs.

Judgment for plaintiff.

FISET v. LARUE et al.

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Quebec Superior Court, Lemieux, A.C.J. March 19, 1912.

1. EXECUTORS AND ADMINISTRATORS (§ IV C—102)—ADMINISTRATION FOR A LONG PERIOD—DUTY TO RENDER ACCOUNTS—ARTICLE 918 C.C. (QUEBEC).

A testamentary executor who under the will has had the administration of property for a lengthy and indefinite period is bound to render accounts of his administration to the interested legatees at reasonable intervals upon their demand and at their expense; this principle does not conflict with the provisions of article 918 C.C.

[*Quinn* v. *Fraser*, 10 Q.L.R. 320, approved and followed.]

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Statement

THE question which is raised before this Court by the inscription in law to the whole action, stripped of many of its details, is whether the legatee in usufruct of the residue of the testator's property, valued in the inventory at over $250,000, is entitled to demand by judicial proceedings from the testamentary executor and administrator of the estate a detailed statement of account, judicial or otherwise, and accompanied with vouchers, of his administration since the opening of the succession in the following cases: first, where he has refused to furnish such an account; second, when the seizin under the will has lasted more than a year and a day and as in the present case has lasted for more than fourteen years and still continues.

The inscription in law was dismissed.

Lussier & Guimont, for the plaintiff, *J. N. Belleau*, K.C., counsel.

Bédard, Chaloult & Prevost, for the defendant.

Lemieux, A.C.J.

LEMIEUX, A.C.J.:—The defendant maintains the negative and relies on article 918 C.C., which reads as follows, in asking the dismissal of the action:—

> Testamentary executors, for the purposes of the execution of the will, are seized as legal depositaries of the movable property of the succession, and may claim possession of it even against the heir or legatee. This seizin lasts for a year and a day reckoned from the death of the testator, or from the time when the executor was no longer prevented from taking possession.
>
> When his duties are at an end, the testamentary executor must render an account to the heir or legatee who receives the succession and pay him over the balance remaining in his hands.

The executor and administrator who is the defendant in this case concludes from this article that he is not obliged to render an account to the plaintiff, who is the legatee in usufruct of the late L. J. C. Fiset, so long as his duties as an executor and administrator have not come to an end.

The Court of Review at Quebec, composed of Stuart, Casault and Routhier, JJ., has decided that although the testamentary executor only owes an account to the heirs or legatees when his duties have ceased, yet when he is put in possession of all the testator's property and his powers have lasted for a long period of time he must furnish on their demand and at their expense statements of account and must allow them to examine the documents in support of them: *Quinn* v. *Fraser*, 10 Q.L.R. 320. We find that this judgment agrees with the letter and spirit of the law and the following are the reasons for which we accept its provisions.

Article 918 C.C., which the executor invokes, only relates to the testamentary executor who has had the short seizin of a year and a day. In such a case the heir or legatee has every

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means of knowing the position, strength and income of the estate and even the administration of the executor. In fact, according to article 919 C.C., the executor must cause an inventory of the property which is bequeathed to be made immediately upon the death of the testator after notifying the heirs, legatees and other interested persons to be present. The effect of this inventory is to acquaint these latter with the true position of the estate and then at the end of a year and a day they are entitled to have the administrator render them an account.

These various provisions prevent any danger which might result to the heir from an improper administration by the executor. But the universal legatee in usufruct or of the naked ownership is not in the same position when as is alleged in this action, the seizin of the property by the testamentary executor continues for a long and unlimited period.

This leads us to consider the nature of the duties of a testamentary executor. He is the mandatory of the testator appointed in the interest of third parties and for the protection and advantage of the heirs and legatees. He is an administrator of the fortune which is bequeathed to the heirs.

In the present case, according to the action which sets up the will, the administration has a general and unrestricted character. The executor has not only the ordinary powers but he has further the right to dispose of certain property and he receives a salary for his administration. It is essential to the nature of a mandate for a long period that the private or public mandatory should give or render annual or periodical accounts of his administration.

What public body, bank, assurance or stock company is there whose directors, who are the mandatories of the shareholders, do not render every year to the interested parties or to the shareholders who are the mandators a detailed account of their administration?

It would be contrary to the most elementary rules of good sense and to the recognized principles in such cases, to say that the plaintiff, who is the legatee in usufruct of property to the value of over $250,000 which has been administered for fourteen years and who has received no account of his administration from the administrator on account of his refusal to render one, is not entitled to receive information in regard to such administration.

If the plaintiff is not entitled to such a statement of account, how can it be said that she enjoys all the fruits and revenues of her usufruct. She is entitled to know whether the administration has been honest, profitable and in good faith, and also to know whether the executor has wasted or dissipated the property which has been entrusted to him or has exercised his functions

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in such manner according to article 917 C.C. as would justify the dismissal in the case of a tutor (article 285 C.C.).

The law allows the heir to ask for the dismissal of a testamentary executor for bad faith or for dissipating or wasting the property which has been entrusted to him. How can the heir exercise this privilege of asking for the dismissal of the testamentary executor on the ground of dishonesty if he has not received from the latter a statement of account which convinces him or gives him reason to presume his dishonesty or peculation. If the testamentary executor had the right to refuse a statement of account when it was demanded, the exercise of the heir's privilege to ask for his dismissal would become illusory.

There are other considerations of private policy and moral reasons which make a judicial demand upon the administrator for a statement of account acceptable and valid. In fact everybody is entitled to enjoy the whole of his revenue and to know the true state of his fortune so that he may rule his conduct, his expenditure and his family matters according to such revenue and fortune.

Article 3, Code of Procedure, declares that whenever the code does not contain any provision for enforcing any right or claim, any proceeding adopted which is not inconsistent with the provisions of the law should be received and held to be valid. The demand in this case is certainly consistent with reason and with the necessity of maintaining family fortunes and property, which are too often diminished and endangered by the incompetence of administrators.

There is no necessity for a text of law in order to maintain the present action if the allegations are proved. It seems to us that an administrator or a testamentary executor, whether he belongs to a liberal profession or not, should always be ready and disposed to furnish an account of his administration so as to preserve the confidence of the heirs and to shew that he is competent to administer the property which has been entrusted to him on account of his presumed capacity and honesty.

The action concludes that the testamentary executor should give and render a judicial account with documents in support of it, etc.

This remedy is perhaps a rigorous one, but there is nothing illegal about it. The circumstances which will come to light during the trial will shew whether the conclusions are justified or not.

For these reasons we think that the action is well founded in law and that the inscription in law should be dismissed.

Appeal dismissed.

ROBINSON v. GRAND TRUNK R. CO.

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1912

June 6.

Ontario High Court. Trial before Latchford, J. June 6, 1912.

1. CARRIERS (§ III G—441)—LIABILITY OF RAILWAY TO CARETAKER OF STOCK—REDUCED FARE—NO PRIVITY BETWEEN CARETAKER AND RAILWAY—EXEMPTION FROM LIABILITY.

One travelling upon a railway in charge of live stock at a reduced fare, which is paid by the shipper of the live stock, is not bound by a special contract between the shipper and the railway company relieving the company from liability in case of his death or injury, of which he had no knowledge, to which he was not a party, and from which he derived no benefit.

[*Goldstein* v. *Canadian Pacific R. Co.*, 23 O.L.R. 536, specially referred to.]

Statement.

ACTION for damages for injury sustained by the plaintiff by reason of the defendants' negligence, in the circumstances mentioned below.

Judgment was given for the plaintiff with costs.

W. L. Haight, for the plaintiff.

D. L. McCarthy, K.C., and *W. E. Foster*, for the defendants.

Latchford, J.

June 6, 1912. LATCHFORD, J.:—That the defendants caused injury to the plaintiff by their negligence was formally admitted at the trial, where the damages which the plaintiff thus sustained were fixed by a jury at $3,000.

It is, however, contended on behalf of the defendants that they are relieved from liability by the terms of a contract made between them and one Dr. Parker, who shipped a horse in charge of the plaintiff from Milverton, in the county of Perth, to South River, in the district of Parry Sound. Dr. Parker had purchased the horse for his friend, Dr. McCombe, of South River; and, at the latter's request, the plaintiff proceeded to Milverton to bring up the horse; the rules of the defendants requiring that live stock shipped more than a hundred miles should have a man in charge.

The plaintiff accompanied Dr. Parker to the railway station, and was present when the shipping bill and special contract upon which the defendants rely was signed by the defendants' agent and by Dr. Parker, who thereupon, at the instance of the agent, handed it, folded, to the plaintiff. In the margin of the contract is written, "Pass man in charge at half fare." The plaintiff did not open or read the contract. Its purport was not made known to him by any one, nor was he required by the agent (as the form directs) to write his name upon it. He paid no fare, and was asked for none. Half fare for him was, however charged in the bill rendered to Dr. McCombe at South River for the carriage of the horse, and both charges were paid by Dr. McCombe. During the transit, a rear-end collision negligently

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occurred at Burk's Falls, and the plaintiff sustained serious injury.

The contract under which the horse was carried was before the Board of Railway Commissioners of Canada for approval, on the 17th October, 1904, upon the application of the three great railway systems of the Dominion and of the Pere Marquette Railroad Company. An order was thereupon made, which, after referring to the matter as one of great importance, "requiring that much circumspection should be exercised in examining into the forms which the Board hereafter has to approve and also into the question of limitation of liability on the part of the carriers," empowered and authorised the applicants to use the forms submitted "until the Board shall hereafter otherwise order and determine."

The form signed by Dr. Parker is identical with that then temporarily authorised by the Railway Commissioners; and, though nearly eight years have elapsed, no further or other order has been made in a matter so seriously affecting the relations between the principal railways of the country and the shippers of live stock. The important provision is as follows:—

"In case of the company granting to the shipper or any nominee or nominees of the shipper a pass or a privilege at less than full fare to ride on the train in which the property is being carried, for the purpose of taking care of the same while in transit and at the owner's risk as aforesaid, then as to every person so travelling on such a pass or reduced fare the company is to be entirely free from liability in respect of his death, injury or damage, and whether it be caused by the negligence of the company, or its servants or employees, or otherwise howsoever."

In view of the decisions of *Bicknell* v. *Grand Trunk R.W. Co.* (1899), 26 A.R. 431, and *Sutherland* v. *Grand Trunk R.W. Co.* (1909), 18 O.L.R. 139, it cannot be doubted that the contract was binding upon Dr. Parker. That point, however, is not involved in the present case. Here the question is this: Is the plaintiff bound by a contract made between the shipper and the carrier to which the plaintiff was not a party and of the terms of which he had no knowledge? I have been referred to no case which decides this affirmatively.

In *Goldstein* v. *Canadian Pacific R.W. Co.* and *Robinson* v. *Canadian Pacific R.W. Co* (1911), 23 O.L.R. 536, the carriers appear to have recognised their liability for negligence causing damage to persons accompanying live stock under a contract identical with that made between Dr. Parker and the defendants. The contract bore the same "note" as here; and in both cases, as here, the men accompanying the stock were not required to sign or endorse the contract. Unlike the present case, the relation of master and servant—if that is at all material—

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existed between the shippers and the men accompanying the stock. The question before the Court for decision was the right of the carrier to recover from the shippers the amounts paid by the railway company to Robinson, who was injured, and to the personal representatives of Goldstein, who was killed. Garrow, J.A., in his judgment (p. 540) says: "No trial having taken place, it is now quite impossible accurately to ascertain what the defendants feared, or exactly why they settled; the only really material fact appearing, so far as the third parties (the shippers) are concerned, being that, before doing so, the defendants took the precaution of obtaining from them the undertaking not to dispute the liability of the defendants to the plaintiffs, or the amounts at which it was proposed to settle." The learned Judge then proceeds to say that the question before the Court was merely the right of the defendants to indemnity for the amounts so paid; and, applying the rule that generally the right to indemnity, unless expressly contracted for, must be based upon a previous request, express or implied, to do the act in respect of which indemnity is claimed, the learned Judge held that, in the circumstances, there was no express covenant or contract of indemnity, and that it would be impossible in law to imply one. The case against the third parties was, therefore, dismissed.

In my opinion, I am not bound by the opinions expressed by Meredith, J.A., in his judgment (pp. 542 and 543) as to the right or absence of right on the part of those injured by the carriers, arising out of the contract made between the shippers and the railway company. These opinions are, I think, mere *dicta*, not necessary to the determination of the question of indemnity which was before the Court.

I am firmly of the opinion that Robinson's common law rights against the defendants were not taken away by the contract made between the defendants and Dr. Parker. Any other view appears to me necessarily to imply that, by a contract to which he was not a party, under which he derived no benefit—the reduction in fare benefiting only the consignee—and of whose terms he had neither notice nor knowledge, his right to be carried without negligence on the part of the defendants was extinguished, and they were empowered, without incurring civil liability, to maim and almost kill him while he was lawfully upon their train. If such can possibly be the effect of the special contract, a higher Court must so decide.

I direct that judgment be entered for the plaintiff for $3,000 and costs.

Judgment for plaintiff.

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H. C. J.
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June 20.

Re DRUMMOND.

Ontario High Court, Middleton, J. June 20, 1912.

1. WILLS (§ III G 8—158)—DEVISE—CONSTRUCTION—DIVISION OF RESIDUE SO AS TO MAKE SHARES OF EACH CHILD EQUAL—TESTATOR'S INTENTION.

Where a will provided that if, at the time when a division was being made of the residue of the testator's estate directed by another clause of the will to be equally divided among the testator's children, the executors under the will should be of the opinion that the fees simple of certain parcels of land specifically devised respectively to his several children for life with remainder over, the several parcels were not then of equal value, the executors should before dividing the residue, apportion to each except the one having the most valuable parcel of land, a sum equal to the estimated difference in each case, which provision was supplemented by another clause directing that if the residue was not sufficient for the purpose of equalization, then the person whose estate was more valuable should pay to the other or others such amount as might be necessary to bring about equalization and giving the executors authority to charge the fee simple of the more valuable parcels of land, the powers thus created are not appurtenant to the office of executor but are personal to the executors named in the will and if they are all dead at the time when the power comes to be exercised, no one can be clothed with authority to act in their place in exercising such powers, and this duty will fall upon the Court through its proper officers.

2. WILLS (§ III L—198)—DEVISE—DIVISION OF RESIDUE—APPORTIONMENT BY TRUSTEES TO EQUALIZE VALUE OF CHILDREN'S SHARES.

When a testator devises parcels of real property respectively to his children for life, with remainder to their issue, and provides that upon the distribution of the residue of his estate, if, in the opinion of his trustees, the fee simple of the several estates should not then be of equal value, they should apportion to each a sum equal to the difference between the life estates and the value of the most valuable, the sum necessary to equalize such values, or the amount charged, as the will directed, upon the most valuable property for such purpose, will be treated as an increment to the less valuable shares, and be held in the same way as the respective parcels.

Statement

ORIGINATING notice to determine certain matters arising upon the will of the late J. W. Drummond.

C. J. Holman, K.C., for Hester A. Worden, Charlotte E. Benn, and Eveline E. Drummond.

G. C. Campbell, for Laura Pearean.

W. H. Irving, for Isabel Segsworth.

F. W. Harcourt, K.C., for infant children.

Adult children were represented by the same counsel as their parents.

Middleton, J.

MIDDLETON, J.:—The testator died on the 9th September, 1881, leaving the will in question, dated the 5th December, 1879. He was survived by his widow and five daughters. The widow died on the 23rd March, 1912. The five daughters have all survived her. The daughter Hester is married, and has five children; the daughter Charlotte is married, and has two

children; the daughter Isabel is married, and has no children; the daughter Laura, married, has two children; the remaining daughter, Eveline, is unmarried.

By his will the testator gave his wife a life interest in the whole estate; and, subject to this, he gave to each daughter a parcel of land, to be held by her during her natural life, and after her death to go to such of her children as may then be living and to the issue of any deceased child. The testator, in addition, had certain residuary estate, consisting principally of some lands in Adelaide street, now said to be worth approximately $50,000. By the 10th clause of the will, the testator directs that, subject to the provision next mentioned, this residuary estate shall be equally divided between his children.

In clause 18 of the will is found a provision which occasions the present controversy. By it, the testator directs that if, when the division is being made of this residuary estate, his trustees shall be of opinion that the "fee simple(s) of the several properties" specifically devised to his daughters for life are not then equal to each other in value, the trustees shall, before dividing the estate, apportion to every person entitled to property of less value than the most valuable, a sum equal, in their opinion, to the difference between the value of the fee of the property devised and the value of the most valuable property; it being his intention that each of his children should receive as nearly as may be equal shares of his estate.

This provision is supplemented by clause 24, which directs that, in case this residuary estate is not sufficient for the purpose of equalization, the person whose estate is more valuable shall pay to the other or others such amount as may be necessary to bring about equalization; and the executors are given power to charge the fee simple of the lands which are to be burdened.

The executors upon whom this duty devolves are all dead; and the first question calling for determination is, whether a new trustee should be appointed, and whether the powers were appurtenant to the office or personal to the executors named. I came to the conclusion upon the argument that the powers were personal to the executors, and that, there being no one who could exercise the power, the duty would devolve upon the Court, through its proper officers, to exercise the function imposed upon the executors by the will.

Counsel all agreed in this view; and it was then arranged that, instead of directing a reference, valuators should be named, who should value the different parcels. This valuation has now been made. In the result the parcel given to Hester is valued at $92,000; the portion given to Eveline is valued at $75,000; the parcel given to Charlotte, $92,000; that given to Isabel, $75,000; and that given to Laura, $128,000.

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RE DRUMMOND.

Middleton, J.

The will itself is very obscurely expressed, and I have to determine whether, upon the true construction of the will, these values are the values which control and govern. I have come to the conclusion that they are. The testator has, I think, treated the daughter's share as covering that which is to go to her children upon her death; and the equality which he desires to have attained is not an equality between the life estates of the several daughters, but equality between the shares going to each daughter and her issue.

I think, further, that the words used in clause 18 indicate that what is to be valued is "the fee simple of the several properties," and that the distribution of the residuary estate and the charge upon the more valuable properties to be made for the purpose of equalization is to be treated as an increment to the less valuable shares, and that the sums to be set apart to produce this equalization must be held in precisely the same way as the less valuable shares are themselves held; that is to say, any money set apart from the proceeds of the residuary estate, or any money charged upon the more valuable property, will be held in trust for the daughter who has the less valuable property, for her life, and upon her death will go to her children and the issue of deceased children.

Disregarding for the present minor matters, such as the $1,000 to be given to the daughter who is yet unmarried and the sums to be charged with respect to the small parcels of land that have been already sold, the result of the valuations is, to give to each daughter an estate of the value of $92,000; so that neither Hester nor Charlotte is entitled to receive nor liable to be called upon to pay anything to bring about equalization. Laura must pay, to bring about equality, $34,000. Eveline and Isabel will each receive $17,000.

If the residuary estate, when sold, realises $50,000, Hester and Charlotte will each receive one-fifth—$10,000; Laura's one-fifth will be primarily applicable to reduce from $34,000 to $24,000 the charge which would otherwise be placed upon her property; Eveline and Isabel will receive each from this source $5,000 in addition to their $10,000 share; and the amount of their charge on Laura's property will be reduced from $17,000 to $12,000 each.

When I speak of these moneys being "received," and the charge being made in favour of Eveline and Isabel, my meaning is, of course, that these sums of $5,000 and the charges of $12,000 shall, as already stated, be held upon trust for them and their children in the same manner as their respective parcels are held.

I have not followed the precise direction of the will by creating charges upon each property so as to bring it up to the

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value of Laura's, because this would involve imposing charges upon the shares of Hester and Charlotte, and they would receive charges upon Laura's estate to precisely the same value. I set off what they would have to pay against what they would be entitled to receive, had the mode of compensation pointed out by the testator been followed strictly. The result is, however, mathematically equivalent.

The valuations which have been made state that the buildings upon the different properties, other than Mrs. Pearean's, are not to be considered as worth anything, because no one would purchase the property at anything like the price at which it is now valued with any other idea than the demolition of the old buildings now upon the land.

With reference to the building upon Mrs. Pearean's property, it is, I think, to be disregarded, because the lease must be assumed to be an entire bargain, and if as the realisation of that lease she receives a building of considerable value for a small sum, she is entitled to this advantage, which will go to compensate her for what is possibly an inadequate rental.

A trustee should be appointed to sell the residuary property and divide the proceeds.

The properties devised to the daughters other than Laura may be vested in them and their issue, in accordance with the terms of the trust; or, if it is thought more to their advantage, the properties may be vested in trustees on the same trusts.

Mrs. Pearean's property will be charged with payment of the $24,000, with interest at five per cent.; the principal to fall due as to one-half upon the death of Eveline, the other half upon the death of Isabel. The charge will be to a trustee, upon the proper trusts, for each daughter for life, and, after her death, for division as directed by the will. Mrs. Pearean should have the privilege of paying off the whole or any portion of this charge at any time she may desire, when the money will be held upon the same trusts.

The shares of all the daughters in the residuary estate (except Mrs. Pearean's share, which is to be applied pro tanto in ease of the charge) will go to the respective daughters absolutely.

The figures can be adjusted and the details arranged when the order comes to be settled.

The interest upon the charge on Mrs. Pearean's share will be payable out of the rent.

Some discussion took place as to the effect to be given to the leases. I do not think they have any effect upon the valuation. The leases must be assumed to have been properly made by the life tenant. If they are open to attack, then they must be

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attacked directly, or her estate must be made answerable. Leases made by the life tenant within her authority, or sanctioned by the Court under the Settled Estates Act, are not made a factor in the valuation.

Costs of all parties, and the valuators' fees, will be paid by the trustee out of the proceeds of the residuary estate.

Judgment accordingly.

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July 15.

FULLER v. MAYNARD.

Ontario High Court. Trial before Falconbridge, C.J.K.B. July 15, 1912.

1. SPECIFIC PERFORMANCE (§ I A—12)—PERSONS ENTITLED TO—JUDICIAL DISCRETION.

The granting of relief in a proceeding for the specific performance of a contract, lies in the discretion of the Court, and will not be exercised arbitrarily or capriciously, but only where it would be inequitable to deny such relief.

[*Cloaces* v. *Higginson* (1813), 1 V. & B. 524; *Harris* v. *Robinson* (1892), 21 Can. S.C.R. 390; *Lamare* v. *Dixon* (1873), L.R. 6 H.L. 414; *Corcatry* v. *McLean* (1892), 22 O.R. 1, referred to.]

2. VENDOR AND PURCHASER (§ I C—17 —OBJECTIONS TO TITLE—INCUMBRANCES.

An outstanding incumbrance is a mere question of conveyance as distinguished from a question of title, and it is not ordinarily necessary for the purchaser to serve a formal objection to title in regard thereto.

[Armour on Titles, 3rd ed., pp. 47, 150, 151, specially referred to; *Townsend* v. *Champernowne*, 1 Y. & J. 538, approved.]

Statement

PURCHASER'S action for specific performance of a contract for the sale of land.

Specific performance was denied.

G. Kappele, K.C., for the plaintiff.

A. J. Russell Snow, K.C., for the defendant.

Falconbridge, C.J.

FALCONBRIDGE, C.J.:—Exhibit 1 is the contract whereof specific performance is sought by the plaintiff.

Wherever Messrs. C. Kappele and Nasmith differ in their recollection of what was said, either face to face or by telephone, I am bound by law to find the statements of the former not proven. These two witnesses are on the same plane as regards worldly position and demeanour in the box, and there are no compelling outside circumstances to turn the scale in favour of Kappele's statements.

On the contrary, it is quite manifest from Kappele & Kappele's letter to their client of the 1st September that they were then attaching very little importance to their requisitions on the title. The only faint suggestion in the argument about

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title was one calling for an outstanding mortgage and discharge thereof. This is a mere question of conveyance, and not of title: Armour, 3rd ed., pp. 47, 150, 151; *Townsend* v. *Champernown* (1827), 1 Y. & J. 538 (incorrectly cited in cases and text-books as "Champerdown.")

There was, therefore, no verbal extension of time granted by the defendant's solicitors, and they had no reason to believe that their answers to the requisitions were not satisfactory, nor that any question of title stood in the way of closing the matter. That was the position before and on the 17th September—the day fixed for completion according to the terms of the contract.

The plaintiff was in England, and his solicitors, being pressed by Nasmith to close, cabled him on the 6th October: "Maynard Tilley titles satisfactory, cable moneys." And again on the 10th October: "Vendor threatening, cable."

The plaintiff answered on the 12th October: "Wait my arrival 23rd day of October;" and this was communicated to the defendant's solicitors.

On the 14th October the defendant's solicitors write to the plaintiff's solicitors: "Without waiving the benefit of the clause making time the essence of the contract, and in order that your client may not have any cause of complaint, we now notify you on behalf of our client that the sale must be completed on or before Thursday the 19th day of October, 1911, inclusive; otherwise," etc.

The plaintiff's solicitors say that this did not reach them until the 16th. The plaintiff arrived in Toronto on the 24th October. The defendant's solicitors waited until the 28th October, and then wrote to say that the sale was off. They now suggest (and the circumstances lend colour to the theory) that the plaintiff did not arrive with the money to carry out the transaction, but was marking time in order to turn his bargain over to some one at a profit. This he thought he had succeeded in doing; and on the 8th November his solicitors signified to the defendant's solicitors their readiness to close out the purchase.

A tender of money (temporarily supplied to the plaintiff for the purpose by certain persons to whom he had apparently succeeded in reselling the property) and documents was made by the plaintiff on the 10th November—the deeds and mortgages not being in the form settled by the defendant's solicitors, in this respect at least that a lady's name was inserted along with the plaintiff's and the grant made to them "as joint tenants and not as tenants in common," and the two were made mortgagors. This, it is said, was done with the view of preventing Mrs. Fuller's dower attaching—she being in England, and the plaintiff having forgotten, he said, to bring out the mortgages which had been sent to him there for execution.

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Assuming that the stipulation in the original contract that time should be of the essence thereof was waived by conduct of the parties, e.g., by Nasmith urging Kappele to cable to his client, etc. (*Devlin* v. *Radkey* (1910), 22 O.L.R. 399, at p. 411; Fry, sec. 1120): was the notice of the 14th October a reasonable one? That is a question of fact: Fry, 5th ed. (Can. notes), sec. 1128.

The 14th October was a Saturday. The defendant's solicitors knew that the plaintiff was in England or on the sea. In *Hetherington* v. *McCabe* (1910), 1 O.W.N. 802, my brother Britton held a notice given on Friday the 7th to close at or before 3 p.m. on Monday the 10th of the same month, not to be a reasonable notice. Vide *Crawford* v. *Toogood* (1879), 13 Ch. D. 153. So here it might be considered that the notice was not reasonable. But the defendant did not assume to act promptly or strictly upon it. The utmost consideration and leniency were extended to the plaintiff. The defendant waited till the plaintiff had been four days in Toronto, when it was manifest that he was only playing fast and loose with the defendant so as to get some one to step into his shoes. Nasmith says that, if the plaintiff had come in on the 24th October, he believes Ryrie (the man behind the defendant) would have accepted the money.

The jurisdiction in specific performance is in the discretion of the Court—Fry, sec. 44—a discretion not to be arbitrarily or capriciously exercised, but only in cases where circumstances dehors, independent of the writing, are shewn making it inequitable to interpose for the purpose of specific performance: per Plumer, V.-C., in *Clowes* v. *Higginson* (1813), 1 V. & B. 524, 527.

That eminent civilian and equity Judge, Strong, J., says, in *Harris* v. *Robinson* (1892), 21 Can. S.C.R. 390, at p. 397, that "the exercise of the jurisdiction is a matter of judicial discretion, one which is said to be exercised as far as possible upon fixed rules and principles, but which is, nevertheless, more elastic than is generally permitted in the administration of judicial remedies. In particular it is a remedy in the application of which much regard is shewn to the conduct of the party seeking the relief." And further on (p. 404): "The rule which governs the Courts in giving relief by way of specific performance of agreements, even in cases in which time is not made of the essence of the contract, is that a plaintiff seeking such relief must shew that he has been always ready and eager to carry out the contract on his part." See also *Lamare* v. *Dixon* (1873), L.R. 6 H.L. 414, 423; *Coventry* v. *McLean* (1892), 22 O.R. 1, at p. 9.

Judged by these standards, the plaintiff fails to qualify himself to invoke the interposition of the Court by way of specific performance, even if the other issues involved were decided in

his favour—e.g., if there were no valid rescission by the defendant.

Therefore, I will not decree specific performance; and, as to this, his action stands dismissed.

But he will have judgment for the $500 paid on account. This was, in the present state of the real estate market, a minor, nay, an inconsiderable, side-issue. The disposition of the costs will, therefore, be, that the defendant shall have full costs, minus the sum of $50, representing costs of the issue as to the $500. The defendant will retain the balance of his costs out of the $500.

Specific performance denied.

REX v. JOHNSON.

Manitoba King's Bench, Prendergast, J., in Chambers. March 6, 1912.

1. HABEAS CORPUS (§ I C—13*a*)—SUMMARY CONVICTION—POLICE MAGISTRATE'S POWERS.

A summary conviction by a city police magistrate under the vagrancy clauses, Cr. Code R.S.C. 1906, ch. 146, secs. 238 and 239, may be quashed for irregularity on proceedings in *habeas corpus* and *certiorari* in aid taken on behalf of the defendant committed under such summary conviction, and is, in that respect, distinguishable from convictions made by city police magistrates for indictable offences under their extended jurisdiction under Cr. Code sec. 777.

[*Rex* v. *McEwen*, 13 Can. Cr. Cas. 346, 7 Man. L.R. 477, distinguished.]

2. SUMMARY CONVICTION (§ III—21)—DEPOSITIONS—OMISSION TO SWEAR STENOGRAPHER.

The omission of the magistrate on the trial of a summary conviction matter to swear the stenographer before taking the evidence, is a matter of substance and goes to the jurisdiction of the magistrate so as to invalidate a conviction.

[*Rex* v. *L'Heureux*, 14 Can. Cr. Cas. 100, followed.]

Statement

MOTION on *habeas corpus* and *certiorari* in aid, following a summary conviction of the defendant upon a charge that she did unlawfully, being a common prostitute or night-walker, wander in the streets of the city of Winnipeg, not giving a satisfactory account of herself when called upon to do so, and is thereby a loose, idle, and disorderly person and a vagrant.

The grounds of objection taken in the summons were:—

1. That the information and conviction were bad, in that they disclosed no offence in law.

2. That the magistrate did not, before the stenographer took the evidence, first administer the oath to the said stenographer that he would truly and faithfully report the evidence, as required by statute.

3. That there was no evidence to support the conviction.

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THE conviction was quashed and the prisoner was discharged from custody.

P. E. Hagel, for the prisoner.

R. B. Graham, for the Crown.

PRENDERGAST, J.:—I overrule the preliminary objection to the application based on 31 Car. II. ch. 2, sec. 2. *Rex* v. *McEwen*, 13 Can. Crim. Cas. 346, 7 Man. L.R. 477, deals only with convictions by a Police Magistrate exercising the extended jurisdiction to try indictable offences summarily, and not with summary convictions. It has been the constant practice of this Court to deal with such matters as this one on application for *habeas corpus*—as in *The King* v. *Pepper*, 15 Can. Crim. Cas. 314, and in *Rex* v. *Barnes*, 21 Man. L.R. 357, 18 W.L.R. 630. See also *Rex* v. *Leschinski*, 17 Can. Crim. Cas. 199, 19 W.L.R. 602, and the comment therein on *The Queen* v. *St. Clair*, 3 Can. Crim. Cas. 551, as to the original jurisdiction of the Court of King's Bench in England and of this Court.

On the first ground urged for the applicant, I hold that the information and conviction disclose a criminal offence under sec. 238 (*i*) of the Criminal Code.

As to the second objection, that the stenographer was not sworn, as required by sec. 683, I uphold the same; and, adopting the views of Craig, J., in *Rex* v. *L'Heureux*, 14 Can. Crim. Cas. 100, 8 W.L.R. 975, I hold this to be fatal. There are then no valid depositions, there is no valid evidence to support the conviction; and this, of course, is not a mere matter of form or procedure, but one of jurisdiction.

The conviction will be quashed, and the prisoner discharged from custody.

Prisoner discharged.

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LAMONTAGNE v. WOODLANDS.

Manitoba King's Bench. Trial before Mathers, C.J.K.B. July 24, 1912.

1. BRIDGES (§ I—8)—LIABILITY OF MUNICIPAL CORPORATION FOR FAILURE TO ERECT BRIDGE—DITCH ALONG SIDE OF HIGHWAY.

Where a municipality, to which the plaintiff had agreed to sell land for a highway as soon as he had acquired title thereto, constructed such road, and then an adjoining municipality, under sec. 516 of the Municipal Act, R.S.M. 1902, ch. 116, constructed a ditch along the side of the highway, the plaintiff is not, apart from negligent construction of the ditch, entitled to damages from the latter municipality because he could not cross such ditch with teams and vehicles without the construction of a bridge.

2. MUNICIPAL CORPORATIONS (§ II G 3—236)—LIABILITY FOR DAMAGES—FAULTY CONSTRUCTION OF A DITCH—UNDERMINING OF ABUTTING LAND—FALL OF FENCES.

A municipality is answerable where the waters of a ditch constructed along a highway undermined the land of the abutting owners and caused the fall of fences thereon.

3. WATERS (§ I C—18)—LIABILITY OF MUNICIPALITY FOR CONSTRUCTING DITCH TURNING WATER INTO A RAVINE.

A municipality that constructs a drainage ditch and carries the water therefrom into a ravine on the land of the plaintiff, which was not a natural watercourse, is answerable in damages therefor.

4. MUNICIPAL CORPORATIONS (§ II G 3—241)—LIABILITY FOR DAMAGES—FLOODING OF RAVINE.

A municipality is answerable in damages where it entered upon the land of the plaintiff and enlarged a ravine that was not a natural watercourse, into which it wrongfully carried water by the construction of a drainage ditch.

5. DAMAGES (§ III K 1—214)—LIABILITY OF MUNICIPAL CORPORATION FOR OPENING DITCH—EROSION OF ADJOINING LAND.

A municipality is answerable in damages for its wrongful act in casting water into a ravine on the land of the plaintiff, the result of which was to cause a more rapid erosion of the land at the mouth of the ravine, and to keep the land about it wet and impassable for a longer period than formerly.

Statement

TRIAL of an action against a municipal corporation for trespasses in the construction of drainage works.

Judgment was given for the plaintiff.

M. G. Macneil and *B. L. Deacon*, for plaintiff.
J. B. Coyne and *A. C. Campbell*, for defendants.

Mathers, C.J.

MATHERS, C.J.K.B.:—In the fall of 1908 the defendant municipality constructed a ditch from near Marquette station, on the Canadian Pacific Railway, so as to drain the water from certain sloughs in that municipality into the Assiniboine river. To reach the Assinboine it was necessary that the ditch should pass through the municipality of St. Francois Xavier. Provision for such a contingency is made by sec. 516 of the Municipal Act. The defendants complied with the provisions of this section, and obtained the authority of the municipal commissioner for the construction of this ditch through the municipality of St. Francois Xavier.

In 1901 the latter municipality had opened a highway between lots 205 and 206 of the parish of Baie St. Paul, 66 feet wide, of which 33 feet was taken from each lot. This public highway extended from the main highway between Winnipeg and Portage la Prairie to the road allowance at the rear of the river lots.

In 1905 this road was graded to a point a short distance from the rear of the river lots. It was there deflected in a northwesterly direction across lot 205, so as to meet the main road to Marquette station, thus cutting off a triangular portion from the north end of lot 205. The work of grading this road was performed by the municipality of St. Francois Xavier.

The plaintiffs owned the eastern six chains of lot 205. Before constructing this cut-off, an arrangement was made with the plaintiffs for the sale of a strip 66 feet wide to the municipality

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for the sum of $40. At that time the plaintiffs had not a title to the land, and payment of the purchase price was deferred until title should be acquired.

The municipality at once took possession of the land thus agreed to be sold, and constructed the grade across it. From that time until the present this road has constituted the main highway from the Portage road to Marquette station.

The ditch constructed by the defendant municipality in 1908 followed the western side of this highway to a point a short distance north of the Portage road. At this point there is a ravine, which runs in a westerly direction from this road across the plaintiffs' land on to the adjoining land to the west, crosses under the Portage road and then turns eastward and empties into the Assiniboine river on the plaintiffs' land. The defendants turned their ditch into this ravine, and, as it was not sufficiently deep, they entered on the plaintiffs' land and excavated with teams and scrapers in the ravine across the plaintiffs' land.

The plaintiffs complain in this action of several trespasses. First, in constructing the ditch along the south side of the cut-off before spoken of; secondly, in constructing the ditch along the highway between lots 205 and 206; thirdly, in entering upon the plaintiffs' land and excavating through the ravine. The plaintiffs claim to be damaged in several ways by these trespasses. First, about two acres of their land is severed from the balance by the ditch along the cut-off, which is so deep and wide that they are unable to cross; secondly, the waters coming down the ditch have eaten into the plaintiffs' land along the west side, causing the banks to cave in and his fences in some parts to fall into the ditch; thirdly, at a low point some distance north of the ravine it is said that the ditch, during the spring freshets and during heavy rains, overflows its banks, and the waters back up on to and cover a large portion of the plaintiffs' land, and that, when the waters in the ditch have fallen and these waters are receding from the plaintiffs' land, they have cut a trench of considerable dimensions back into the plaintiffs' land; fourthly, that the excavation in the ravine and the quantity of water brought into it makes it impossible now for the plaintiffs to cross the ravine north of the Portage road with waggons and teams, as they had formerly been able to do; fifthly, that for the same reason they are unable to cross the ravine south of the Portage road; that their houses and buildings are on the south side of the ravine, and that in order to reach the Portage road they have now to go upon their neighbours's land and reach it in that way; and, sixthly, that at the mouth of the ravine the rush of water has worn away the land so as to form a large excavation twelve or fifteen deep and twenty or thirty feet across.

In the first place, I find that the plaintiffs had agreed to sell the land required for the cut-off to the municipality of St. Francois

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Xavier, and that such municipality entered upon it and constructed the road across this cut-off pursuant to that agreement. I find, also, that the land between lots 205 and 206 was duly opened by by-law of the municipality of St. Francois Xavier, and that since 1905 it and the cut-off have been graded and constantly used as a highway, with the entire consent of the plaintiffs, and that the same then became and has since continued to be a regularly constituted public highway.

I find that the ditch across the cut-off is such as to prevent the plaintiffs crossing without a bridge, but, as it is not alleged that the ditch was negligently constructed at that point, and as the defendants were properly authorized to do it, the plaintiffs are entitled to no damage on this form of action because of this work.

I find that the plaintiffs' land along the side of the ditch between 205 and 206 has been worn away by the action of the water in the ditch at some places to the extent of two feet, and that his fence has in some places fallen into the ditch by the action of the water.

I find that at a low point north of the ravine the ditch did overflow and back up on to the plaintiffs' land, but I cannot find that the wearing away of the land at this point was due to the receding of the water which overflowed the ditch. It is shewn by the evidence that there is a runway from the north-west that enters and crosses the plaintiffs' land at this point, and that large quantities of water come down this runway and enter the ditch at the point in question. I think it much more probable that the wearing away of the plaintiffs' land was due to the action of this water than to the water that had overflowed from the ditch.

I find that the plaintiffs' land is, on the whole, rendered drier and better for cultivation by the construction of this ditch than it was before the ditch was constructed, and in that respect the construction of the ditch has been beneficial.

I find that in entering upon and excavating in the ravine the defendants were trespassers, and that by such trespass they have made it impossible for the plaintiffs now to cross the ravine north of the Portage road with teams and vehicles as they formerly could.

I find that a large quantity of additional water now passes through the ravine from what formerly passed, and that this additional quantity of water has caused a more rapid erosion of the land at the mouth of the ravine, and also keeps it wet and impassable between the plaintiffs' house and the road for a much longer period of the year than was formerly the case.

It was contended on behalf of the defendants that this ravine is a natural watercourse, and, therefore, that the defendants had a right to terminate their ditch there, and turn the waters which

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the ditch was constructed to carry into this ravine. I cannot agree with this contention. I find that this ravine was not a natural watercourse, and that the defendants had no right to turn the waters of this ditch into it. The original plan of this ditch did not terminate at the ravine, and there was no engineering difficulty in carrying the ditch on to the Assiniboine river. It was suggested by one engineer who gave evidence that the fall would be so great at the Assiniboine river that the banks would be largely cut away. That is the only reason assigned for turning the waters into the ravine, and it, of course, can in no way justify the defendants in running the waters over the plaintiffs' land in what is not a natural watercourse.

For the damage caused by the excavation in the ravine and by the pouring of the additional quantity of water into it by this ditch, and for the damage to his fence and land along the margin of the ditch from the cut-off to the ravine, I find that the plaintiffs are entitled to compensation. For the flooding of their lands and for their inability to cross the ditch at the cut-off, I find they are not entitled to damages.

It was suggested that the measure of damage would be the cost of a bridge over the ravine between the house and the road and the cost of a bridge over the ravine north of the Portage road. The plaintiffs are not entitled to be placed in a better position than they were before the committing of the trespasses complained of, and the construction of bridges such as the plaintiffs suggest would provide means of crossing very much superior to the means of crossing which the plaintiffs had before the ditch was constructed. Taking all these matters into consideration, and sitting as a jury, I assess the plaintiffs' damages at the sum of $600.

There will be a verdict for the plaintiffs for $600 and the costs of suit.

The costs of the day allowed to the plaintiffs upon the adjournment at the defendants' request are allowed in addition to the ordinary costs of suit, and are to be taxed to them without regard to the limitation fixed by statute.

Judgment for plaintiffs.

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Manitoba King's Bench. Trial before Mathers, C.J.K.B. July 24, 1912.

1. CORPORATIONS AND COMPANIES (§ V C 1—190)—TRANSFER OF SHARES FOR PURPOSES OF SALE.

A transfer of company shares to a person for sale to another, does not amount to a sale to the transferee.

2. CORPORATIONS AND COMPANIES (§ V F 2—251)—RIGHTS OF TRANSFEREE OR SHARES—ASSIGNMENT AS SECURITY FOR LOAN.

An absolute transfer of company shares is not created by an assignment of them merely as security for a loan.

3. FRAUD AND DECEIT (§ II—6)—SALE OF SHARES—FAILURE TO DISCLOSE FACTS—PROFIT ON SALE OF COMPANY'S PROPERTY.

A sale of company shares is not vitiated in the absence of fraudulent concealment, or misrepresentation as to the value of such shares, by the fact that they were purchased by a third person for the benefit of the company directors without disclosing that the latter would make a secret profit from the sale of the company's assets.

[*Percival* v. *Wright*, [1902] 2 Ch. 421; and *Carpenter* v. *Danforth*, 52 Barb. (N.Y.) 581, followed.]

4. CORPORATIONS AND COMPANIES (§ V F 2—253)—EFFECT OF FRAUD ON SALE OF SHARES.

A sale of company shares induced by fraud is voidable only, and not void.

[*Walsham* v. *Stainton*, 1 De G. J. & S. 678, followed.]

5. EVIDENCE (§ II K—321)—PRESUMPTION AS TO RATIFICATION BY SHAREHOLDERS OF SALE OF SHARES TO THE DIRECTORS—COMPETITION OF THE SALE—ABSENCE OF KNOWLEDGE OF SECRET PROFIT.

A ratification of the sale of company shares to directors who made a secret profit from a sale of the company assets, cannot arise from the fact of the completion of the sale by the shareholders, where they did not learn until long afterward, that the directors made such secret profit.

6. EVIDENCE (§ II E 7—189)—ONUS OF SHEWING RATIFICATION BY SELLER OF SALE OF SHARES INDUCED BY FRAUD.

The onus of shewing ratification by the seller of a sale of company shares, which was induced by fraud of the purchaser, after the former acquires knowledge thereof, rests upon the purchaser.

Statement

TRIAL of an issue as to the ownership of certain company shares.

A. B. Hudson and *H. V. Hudson*, for plaintiff.

C. P. Fullerton, K.C., and *J. P. Foley*, for defendants.

Mathers, C.J.

MATHERS, C.J.K.B.:—This is an issue directed in the winding up of the Kootenay Valley Fruit Lands Company to try the ownership of certain shares now standing in the books of the company in the name of the defendants Israel Bennetto and Charles Wellband.

The company was formed for the purpose of buying and selling a single tract of fruit lands situate in the Kootenay Valley, British Columbia. The nominal capital was $40,000, divided into forty shares of $1,000 each, all of which was subscribed for.

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In 1907 the defendant Bennetto was appointed managing director and treasurer, and he continued to hold those positions until the company went into liquidation in 1911.

The company bought the lands mentioned, and in the spring of 1908 was desirous of selling them. On the 18th of May the directors passed a resolution to accept $80,000 over and above liabilities for their holding, and on the 20th of May the defendants and A. N. McCutcheon were appointed a committee to bring in proposals for disposing of the lands.

At that time the defendant Bennetto was in negotiation with a man named James Cooper of Saginaw, Michigan, and he either had then or in a few days thereafter received a firm offer from Cooper of $98,000; $80,000 being nominally the price paid for the lands, while the balance, $18,000, was to go to Bennetto as a secret profit.

Almost from the commencement the shareholders of the company were divided into two hostile factions. Bennetto was the principal holder in the majority faction, while Sampson Walker was the principal holder in the minority faction.

After the offer from Cooper had been received, Bennetto conceived the design of buying in the minority shares. For this purpose he entered into a partnership with his co-defendant Wellband. The partnership thus formed employed one McLaws, a solicitor, to buy what shares he could in his own name, but for their benefit, he to have, for his share in the transaction, one-third of the profits which were made. The price they agreed to offer was $1,370 per share.

Sampson Walker owned seven shares in his own right. His original holding was six shares, but in February, 1907, he made a loan of $1,500 to one W. F. Teetzel, who was then the holder of four shares. As a bonus for the loan Teetzel agreed to transfer him absolutely one share, and the share certificate was transferred to Walker as security. Walker asserts that in July, 1907, Teetzel made an absolute transfer of his equity of redemption in these shares to him. The document purports to be an absolute transfer in consideration of the delivery up of a note which Teetzel had given for the $1,500 loan. I am satisfied by both the oral and written evidence that this alleged transfer of July was but a mere sham, and that Walker still held three of the Teetzel shares as mortgagee only. This left Walker's holding seven shares in his own right and three as mortgagee from Teetzel.

McLaws approached Walker and offered to buy his shares for $1,370 per share, and Walker agreed to accept that price for the whole ten shares, which included the three of which he was only mortgagee. Walker communicated with Gadsden the plaintiff, who was then the holder of two shares, and told him what McLaws had offered. Neither Walker nor Gadsden was at that time aware of the sale negotiated by Bennetto. Gadsden agreed to

accept the same price for his shares, and later handed the certificate over to Walker, taking a receipt in which it is stated that the shares are transferred for the purpose of collection, and later the certificate representing these two shares was transferred by Gadsden to Walker. This transaction was not a sale from Gadsden to Walker, but was a transfer of the shares for the purpose of collection.

After Gadsden had arranged to transfer his shares to Walker for the purpose named, Walker entered into a written agreement with McLaws for the sale of twelve shares, ten of them at the price of $1,370 and two at the price of $1,350, making a total price of $16,200. This price was to be paid $2,000 in cash; $3,400 on the 26th August, 1908; $5,400 on the 26th August, 1909; $5,400 on the 26th August, 1910.

On the 10th July the transfer of the Teetzel four shares represented by certificate No. 16 was authorised by the directors, and on the same day the two shares standing in the name of the plaintiff by certificate No. 24 from the plaintiff to Walker was sanctioned.

On the 22nd July notice was given of a special general meeting of shareholders for the 5th of August to ratify and confirm the action of the directors in selling all the interests of the company in the land mentioned to James Cooper.

At a meeting, the minute of which shews no date, but which appears to have been held some time between the 13th August and the 19th September, there appears in the minute book a resolution confirming the agreement of sale to James Cooper.

In November, 1908, the plaintiff bought for $1,000 from Teetzel, acting through one Clarke, his interest in the shares transferred as security to Sampson Walker, and he took an assignment from Teetzel and handed such assignment to Walker to be attached to the certificate. Walker, while not positively denying the existence of such an assignment, asserts that he has no recollection of it and he does not produce it. He asserts that the $1,000, which he admits Gadsden paid at that time in respect of these Teetzel shares, was paid at his request, and although he claims to have been the absolute owner of the Teetzel shares from July, 1907, he tells some improbable story about being willing to make Teetzel a present of this $1,000. I find as a fact that the story told by the plaintiff is the correct story, and that he bought the equity in these Teetzel shares after the amount of the equity had been figured out and stated to him by Walker, and that he bought them for his own benefit.

The situation then appears to have been this: Bennetto, the managing director, and Wellband, the director, having negotiated a sale of this property at $98,000, whereby the value of the shares was established at about $2,400 each, conceived the design of buying the shares of the other holders without disclosing this fact; that they succeeded in buying the shares held by Walker in his

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own right, and also the two shares held by Gadsden in his own right, because it is quite apparent that Gadsden transferred those shares to Walker for the purpose of enabling him to transfer them to McLaws; that Walker, although he had no right to do so, agreed to transfer also the shares which he held from Teetzel as mortgagee; that subsequently Gadsden bought the equity in the Teetzel shares, but he did so also for the purpose of selling them to McLaws at the same price as the others were sold, namely, $1,370, and he subsequently by his conduct ratified the sale which Walker had previously made of these shares at that figure.

The question now arises, what are the rights of the parties?

Undoubtedly the shares in question were sold with Gadsden's sanction to McLaws. There is no evidence at all that at the time this sale was made there was any active misrepresentation as to their value. That Bennetto had been guilty of a fraud upon the company in stipulating for a secret profit to himself of $18,000 upon the sale goes without question, but neither Walker nor Gadsden knew about the sale of the property at the time the shares were sold, so that their action in selling was in no way influenced or brought about by the fraud which Bennetto had been guilty of.

The contention of the plaintiff appears to be that the defendants, being directors of the company, occupied a fiduciary relationship to the shareholders which made it impossible for them to buy these shares without disclosing any special facts known to them bearing upon their value. There is no doubt that directors do occupy a fiduciary relationship to the company and the whole body of shareholders. But do they occupy such a position with respect to each individual shareholder? In my opinion they do not. That a director is not a trustee for the individual shareholders and may purchase their shares without disclosing facts which have an influence upon the value of the shares is clearly shewn by *Percival* v. *Wright*, [1902] 2 Ch. 421, and *Carpenter* v. *Darnworth*, 52 Barb. (N.Y.) 581. That is, where the case rests entirely upon the alleged fiduciary relationship.

Of course, if there has been fraud either by active misrepresentation or by a fraudulent concealment (as distinguished from mere non-disclosure), such as falsifying the books of accounts for the purpose of depressing the value of the shares, the case would be entirely different: *Walsham* v. *Stainton*, 1 DeG. J. & S. 678. Had it been represented to the vendors of these shares that the sale was for $80,000, whereas as a fact it was for $98,000, that would have been such fraudulent concealment as would have entitled the vendors to have the transaction set aside. But, so far as I can see, there was nothing of the kind. The case rests solely and entirely upon the non-disclosure by the defendants of the material fact known to them and not known to Walker or the plaintiff.

I think as the law is there was no duty cast upon the defendants to make this disclosure. Consequently the sale stands.

What I have said is sufficient to dispose of this case, but, as there were two other points argued, I think it advisable to express my opinion upon them in case the plaintiff desires to go to the Court of Appeal.

First, the issue is to try the ownership of the shares in question. These shares were admittedly sold to McLaws. Assuming that the sale was induced by fraud, it is not void, but only voidable at the option of the defrauded party. Until that is done the sale stands, and the ownership of the shares remains in the transferee. If the plaintiff were entitled to succeed on the other grounds I would endeavour to prevent the form of the issue standing in his way. I have power, I think, to amend it so as to allow the real question in issue between the parties to be determined, and I would in that case have done so; but, as I have decided against the plaintiff on another ground, there is no object in remodelling the issue.

It is also argued that in any event the plaintiff, with full knowledge of the fraud, has ratified the sale. After the agreement for the sale of these shares both Walker and Gadsden learned that at the time they sold there had been a sale of the property for $80,000. With full knowledge of this fact they went on and carried out the sale. Walker received the payments made by McLaws under the agreement, and Gadsden received his portion of them. That fact, however, appears to be immaterial. There was no duty cast upon the defendants to disclose the fact of the sale, and no fraud in not disclosing it. The material inquiry is, when did Gadsden or Walker discover that the sale was for $98,000 and not for $80,000? That was the fraud for which they would be entitled to relief. Until they had knowledge of that fraudulent act they cannot be held to have elected to confirm the sale. The onus of shewing affirmation after full knowledge of this fact was on the defendants. In my opinion they have failed to satisfy this onus. Gadsden did not know of it until some time in 1911. Walker said he did not know yet that Bennetto had been paid $18,000 as a secret profit. He said he understood it had been voted to him by the directors. When he signed a release of all claims he said he knew Bennetto had no right to retain this money, but that is quite consistent with his statement that it had been voted by the directors. It by no means establishes that it had been obtained fraudulently. On this point I am therefore of opinion that the evidence fails to shew that either Walker or Gadsden had elected to affirm the transaction with knowledge of the fraud.

As, however, I have decided the main point in favour of the defendants, there will be a verdict for them upon the issue with costs

Judgment for defendants.

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MARGOLIS v. BIRNIE.

Alberta Supreme Court, Trial before Stuart, J. June 4, 1912.

1. PRINCIPAL AND AGENT (§ II A—8)—AGENT'S AUTHORITY TO SELL LAND —CONSTRUCTION OF LETTERS—REVOCATION.

An agent is not clothed with authority to make a binding agreement for the sale of land, by letters from his principal, in effect stating his price and terms of payment, and that he would refer all inquiries concerning the land to the agent, and directing that the necessary papers, upon a purchaser being found, be sent him for execution, and that he would come at any time if wanted, where subsequently and before any sale was made by the agent, the principal wrote the agent not to do anything until his arrival.

2. PRINCIPAL AND AGENT (§ I D—25)—RATIFICATION OF AGENT'S UNAUTHORIZED AGREEMENT FOR SALE OF LAND.

An agent's unauthorized agreement for the sale of land can be ratified by his principal only by his unequivocal and definite assent to the transaction.

3. EVIDENCE (§ II E 1—142*a*)—PRESUMPTION AS TO ASSENT BY PRINCIPAL TO UNAUTHORIZED SALE BY AGENT—REPUDIATION OF AGENT'S AUTHORITY.

Assent by a principal to an unauthorized agreement for the sale of land made by his agent, is not shewn where the former continually repudiated the agent's act, although he at one time said he would sign the agreement, but immediately afterward refused to do so, and refused to accept the money paid by the purchaser on the agreement to the agent.

4. PRINCIPAL AND AGENT (§ I D—26)—WHAT CONSTITUTES — MIXING MONEY DUE PRINCIPAL—RETURNING OF AMOUNT PAID AS DEPOSIT.

Ratification of an agent's unauthorized agreement for the sale of land does not arise from the fact that the sum paid the agent by the purchaser was, without the principal's knowledge, included in the amount of a cheque given the principal by the agent for money actually due from him, which sum the former returned to the purchaser's agent as soon as he learned of its inclusion in the cheque.

[*Hunter* v. *Parker*, 7 M. & W. 322; *Brewer* v. *Sparrow*, 7 B. & C. 310; "*The Bonita*," 30 L.J. Adm. 145, referred to.]

Statement

ACTION by the purchaser for specific performance of an agreement for sale of land.

The action was dismissed.

G. H. Ross and *T. M. Tweedie*, for the plaintiffs.

A. H. Clarke, K.C., and *A. E. Millican*, for the defendant.

Stuart, J.

STUART, J.:—Prior to June, 1910, Mathews had been acting as Birnie's agent in collecting rents due to the latter; and, on Birnie's leaving about that time for England, where his family were and where he resided part of the time, Birnie, meeting Mathews in the street near the property in question here, and, having some conversation about other matters, told Mathews, according to the statement of Mathews, that he wished he, Mathews, would sell "that property" for him, and pointed towards the property in question. No price or terms were mentioned; and, of course, it is not and cannot be contended that this was sufficient to give Mathews authority to contract on

Birnie's behalf. Some months later, about the 1st December, 1910, Mathews wrote to Birnie a letter, not produced, in which Mathews told of an offer he had got and asked Birnie his price. Birnie wrote a letter in reply dated the 13th December, only the first page of which, unsigned, is produced. In this Birnie said (I quote his own spelling): "I want $7000.00 that is wat I wented last you of cors you can get mor you can get mor." This ends the page produced. There is a dispute as to what was stated in the rest of the letter. According to Mathews, nothing further was said referring to the property. Birnie states that he said further that he wanted $7,500 clear, and gave terms, and told him to send the papers to him, which, if right, he would sign. Later on, about the first of the year, Mathews wrote again, telling Birnie that he had been offered $7,500, but that he wanted $8,000. This letter was not produced. Birnie replied in a letter of the 26th January, 1911, in which, after referring to some other matters, he said: "I don't blame you for wanting $8,000.00 that prope stick out you will get it yet. Now one as rote to me from Calgary yet. I will till them to go to you. I got the $500.00 all rite thanks. If I am wanted for any Biness I will come when you say so. I am thing of sterting March."

This is all the correspondence from Birnie which is produced. In my opinion, this is not sufficient to constitute Mathews Birnie's agent with authority to sign a binding contract on Birnie's behalf. Proof to establish an agency to sell real estate and to bind the vendor by a contract must, I think, be "clear, certain, and explicit," to quote the words used in Clark and Styles, Law of Agency, p. 166. Nothing more was given by the conversation and the correspondence than authority to find a purchaser. The expression in the letter of the 26th January about sending possible inquirers to Mathews, does not necessarily mean anything more than that he, Birnie, would insist on dealing with possible purchasers through Mathews; it determines nothing as to the extent of Mathews's authority. This is in itself sufficient to determine the first point against the plaintiffs. Mathews, however, stated that he had got a letter from Birnie, to which his own letter of uncertain date, but, according to Birnie, coming in an envelope stamped at Calgary on the 28th February, was a reply, in which Birnie had asked if he, Mathews, wanted anything brought out from England. He said that this letter from Birnie contained no reference whatever to the property in question. Birnie, on the other hand, swore that it contained a specific direction to Mathews not to do anything until he, Birnie, came out; and this is corroborated by the evidence of the defendant's wife and daughter, by affidavit only, but admitted by consent, in which they say they saw this letter, and that it contained what the defendant says it did. In these circumstances, it is quite impossible for me to find that Mathews ever was given authority to make a binding contract on Birnie's behalf. The

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dispute upon the second point is much more difficult to determine. The agreement with the plaintiffs was signed by Mathews on the 9th March, and provided for a purchase-price of $8,000, of which $200 was expressed to have been, and was in fact, paid to Mathews at the time, and of which $1,800 was to be paid on or before the 20th April, 1911, when, as stipulated in the document, a formal agreement was to be drawn up and signed by Birnie. The balance was to be paid in two instalments of $3,000 each in one and two years at 8 per cent.

Birnie arrived in Calgary on the 31st March. There is, unfortunately, much contradictory evidence about what took place between Birnie and Mathews and between Birnie and the plaintiffs between that date and the 20th April. A number of interviews were referred to, but the exact dates could not be given except in the case of the first and second. Birnie and Mathews met on the day of Birnie's return. Birnie says the subject of the sale was not referred to at all. It looks strange on the face of it that Mathews would not mention so important a matter at the very first. On the other hand, if Birnie's story is true, that he had forbidden any further dealings till he came out, then it is not to be wondered at that Mathews would be reluctant to refer to his breach of instructions. Mathews says he told Birnie about the sale at this first interview, and that Birnie, while expressing disappointment that only $200 cash had been received, said that he would sign the agreement.

Mathews also says that at a number of interviews between that time and the 20th April Birnie said he would sign it, but that he would then turn round and say he wouldn't. "He was like the wind; first he would say he would sign, and then he would say he wouldn't." Rudnick, one of the plaintiffs, also says that Birnie and he met in the street about the 11th April; that he had told Birnie then that they were ready to pay the $1,800; that Birnie had said that he had been waiting for them the day before in Mr. Nichols's office (where the agreement was), but that, anyway, "he would sign." Rudnick also said that, about the 20th April, he had met Birnie in the Merchants Bank, and had tendered him or offered to give him the $1,800, and that Birnie had then made an appointment to meet him in Nichols's office later in the day.

The meeting in Nichols's office did take place, but the occurrences there are not very material for my present purpose, because it is admitted that Birnie then refused to carry out the agreement. Birnie states that Mathews, at the second, not the first, interview between them, told him of the sale; that he then protested vigorously against what Mathews had done; that he referred to the letter he had sent forbidding any dealings until his arrival; that he never at any time said, either to Mathews or Rudnick, that he would sign except on condition that his

letters were produced and it was shewn to him that he was wrong as to their contents.

In my opinion, it is not possible to find any ratification upon this evidence, at least taken by itself. Even assuming that Birnie did, on some one occasion, say to Mathews, "I will sign the agreement," without attaching the condition upon which he said he insisted, it is clear from Mathews's evidence that he wavered continually, and that, even at the first interview, he did express dissatisfaction of some kind.

In so far as the evidence of Mathews is concerned, I find it impossible to conclude with sufficient certainty that Birnie ever did definitely and unequivocally assent to the transaction. It must be remembered that Birnie knew that he had written certain letters; that these letters were not all produced to him; and it is not a matter of surprise if he did at one moment give some indication of assent, possibly and even probably because the exact contents of his letters may not have been clear to him, and yet at another moment, in a feeling of confidence that he had not given the authority claimed, may have expressed dissent. It must be remembered also that even Mathews went so far, at one point in his evidence, as to say that it was agreed between him and the plaintiffs that Birnie should not be bound until he signed the agreement.

Mathews rather modified this when its significance was suggested to him, but, in any case, both at this point and on several others, he made one statement at one moment as to what had occurred and then modified or changed his evidence. For this reason, I cannot say that, in the face of Birnie's denials, I am able to accept the evidence of Mathews as against Birnie's. Even if Birnie did say to Mathews at one moment, "I will sign," yet if, very shortly afterwards, as Mathews states, he withdrew his assent, I do not think I should find, upon such evidence, that Birnie ever gave a definite, unqualified and unequivocal assent to the transaction.

With regard to the evidence of Rudnick as to what occurred in the bank, this is also denied by Birnie; and, if Birnie had really intended on that occasion to assent to and confirm the transaction, I can see no reason why he did not then and there take the money that was offered to him.

The very fact that he refused to take it indicates, to my mind, that he was not then intending to assent to the contract, and furnishes a very good reason for hesitating to accept Rudnick's evidence as sufficient, in the face of Birnie's denial, to justify me in finding as a fact a definite and unqualified ratification of what Mathews had done.

There remains, however, another very serious piece of evidence to be considered. Mathews had been collecting rents for Birnie, and had deposited the money in the bank in his own

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name. On some occasion during the three weeks from the 31st March to the 20th April, Mathews met Birnie in the street and gave him a cheque for $509. Mathews says that he then told Birnie that the $200 received from the plaintiffs was included in that cheque, and that he had told him this in answer to a direct question by Birnie. Birnie again contradicts Mathews here, and says that he asked Mathews if the money was "all mine"; that Mathews said it was, but that the $200 was not referred to at all. A witness, Mrs. Elizabeth Tomlinson, says she was present and heard the conversation just as Birnie stated it. Mathews admits that Tomlinson was present during part of the interview, but says that she was not there when Birnie asked the question to which he replied. Now, without saying definitely that I disbelieve Mathews, I must again bear in mind his self-contradictions which I referred to before, and also this other important fact that two independent witnesses, Mr. and Mrs. Campbell, swore that Mathews had told them on separate occasions that he had sold the lots for $9,000.

There was nothing in their demeanour or position to cast doubt upon their integrity, and yet Mathews states that he never said any such thing. He is here contradicted upon a very material matter by two independent witnesses. In the face of this, I do not feel justified in finding as a fact that Birnie received the money knowing it to be the plaintiffs' money. There is also something peculiar about the method which Mathews took to pay the $200 to Birnie. He could very well have drawn a separate cheque for the amount and specified upon its face what it was for. Instead of doing so, he mixed it with other money undoubtedly due to Birnie, and allowed the matter to rest upon his mere verbal statement. Birnie says, and it was not contradicted, that a day or so afterwards Mathews gave him another cheque for $400 on the same account, viz., rents.

It is obvious, therefore, that, when the $509 cheque was given, the whole sum of $509 was due to Birnie in any case. Birnie was, therefore, placed in an equivocal position. Mathews owed him more than $509. He may very well have wanted the money that was due him. As far as Mathews is concerned, it appears very much as if, knowing that Birnie was hesitating about approval of the deal, he sought to compromise him by getting the $200 slipped into his possession by a trick. I do not say that this is in fact the case, but the circumstances are such as to raise that suspicion in my mind. I doubt very much whether a separate cheque for $200, marked, as I have indicated, upon its face as coming from the plaintiffs as part of the purchase-price, would have been accepted by Birnie.

The cases where the receipt of part of the purchase-money has been held to constitute ratification—*Hunter* v. *Parker*, 7 M. & W. 322; *Brewer* v. *Sparrow*, 7 B. & C. 310; *The "Bonita,"*

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30 L.J. Adm. 145—have all been cases where the money was knowingly received as such and without being mixed with other accounts. It is true that Birnie, when, according to his own story, he discovered that he had the $200 that had come from the plaintiffs, did not return it to them, but left it with Nichols. In the circumstances, I think this was sufficient. I have held that Mathews never was authorised to make a contract on Birnie's behalf. He was, therefore, never authorised to employ Nichols as Birnie's solicitor in respect to this transaction. Certainly Birnie never treated him as such. On the other hand, Nichols, on some one's instruction, drew up a formal contract in duplicate for Birnie to sign. The plaintiffs left a marked cheque with Nichols, after signing the agreements themselves and leaving them also with him.

This, I think, constituted Nichols their solicitor and agent; and Birnie, knowing this, was, I think, justified in treating him as such and leaving the $200 with him. The case is one of much difficulty; but, as it is quite clear that Mathews did not have authority to bind Birnie in the first instance, I think the plaintiffs should have recognised that, and, when they saw, as they must have seen, that Birnie was not very eager to ratify what had been done, they should have been content to meet him as if nothing had been agreed upon by him and to treat with him *de novo*. It is, of course, often possible to infer ratification from definite and unequivocal acts; but, where it is sought to prove it by reference to street conversations, where the testimony as to these is so conflicting as it is here, and where even the affirmative testimony shews so much vacillation on the defendant's part, I do not think it is a case in which the Court should be too ready to find facts which would result in a decree for specific performance.

The action will be dismissed with costs.

Action dismissed.

WENER v. RUBIN.

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Quebec Court of King's Bench (Appeal side), Archambeault, C.J., Trenholme, Cross, Carroll and Gervais, JJ. April 29, 1912.

1. EVIDENCE (§ II B—119)—BURDEN OF PROOF—ORDERS ACCORDING TO SAMPLE—DEFECTIVE QUALITY OF WORK.

The burden of proof rests upon the defendant in an action to recover for making a number of suits of clothing, to establish the truth of an affirmative counterclaim that the suits were not made according to a designated sample, as required by the contract, as well as to shew the defective quality of the workmanship of the suits.

Statement

APPEAL from the judgment of the Superior Court, Greenshields, J., rendered on April 5, 1911, maintaining the plaintiff's action for $662.70 for the price of work done.

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The appeal was dismissed.

J. P. Whelan, Margolese and *Britt*, for appellant.

Angers, DeLorimier, Godin and *DeLorimier*, for respondent.

MONTREAL, April 29, 1912. The judgment of the Court was delivered by

CROSS, J.:—The appellant is a dealer in ready-made clothes. The respondent (plaintiff) is a jobbing tailor.

The controversy relates to 282 suits of men's clothes made by the respondent out of cloth supplied by the appellant. Judgment went against the appellant in the Superior Court for $662.70 for the respondent's work in making the suits at $2.35 per suit, plus $9.00 for making three other suits which are not now in question.

The appellant's defence was that the suits were to have been made according to samples, but they were not so made and, besides, were so badly made that they were worthless. The respondent denied that he agreed to make the suits according to sample, and answered that the suits were well made, "de valeur ordinaire et suivant les habitudes et l'usage de ce commerce," and had been received and accepted by the appellant.

As the appellant pleaded affirmatively, the burden rested upon him of proving both the agreement to make according to sample and the defective character of the work. On both points the testimony is contradictory. The plaintiff in his testimony denied that he was to work to sample, but asserted that the $3.00 suits were to serve as models for the shape. On the other hand, the appellant testified that the respondent brought him a sample of a suit which he was willing to make at $2.38 per suit, and that he (appellant) said: "I will give you the work on condition that the goods are made up according to the samples," and he produced in Court a suit which he said was the sample so brought to him. The appellant's manager, Fels, corroborated this testimony, and asserted that he instructed the respondent to make the suits according to the sample.

The learned Judge of the Superior Court, nevertheless, concluded that it had not been proved that the suits were to have been made according to sample. The witness Fels admitted that he gave the instructions by letter. The letter was produced at the trial and is as follows:—

Montreal, April 6, '10.

Correct-Fit Clothing Co.,
242 Main St.,
City,

Sirs,—As per enclosed list we are sending you by our carter, 13 pieces cloth which will make 310 suits or more. Kindly follow instructions given for each piece of cloth and make sizes of pants as per enclosed list.

Most of our cloth are sponged, but those that are not sponged, have them sponged yourself. We trust you will give us early delivery of them as this is only a trial order.

Kindly rush those three good blue suits that we gave to Mr. Rubin to make. As soon as you will bring those three suits, and if they are satisfactory, we will send you a good lot of the goods suits to be made.

We would like you to make a sample coat of every piece of cloth for delivery by Monday as we need them for samples. The sizes of the samples we want are 8, 9, 40.

Yours truly,

The Montreal Waterproof Clothing Co.

S. Z. FELS.

Dict. S. Z. F. Enclosure.

It will be observed that in this letter there is mention of instructions enclosed for each piece of cloth and of a list of sizes, but no mention of a sample having been previously submitted.

A further material circumstance is that the appellant had in his service an employee called a "passer," whose special business it was to examine and either reject or "pass" goods when tendered, but, though this "passer" was examined as a witness, he said nothing about having compared the suits with the sample, but said, on the contrary, that he saw no sample at all. He further testified that after he had examined some of the suits he found them unsatisfactory, reported the fact to the manager, that the manager said he would see the appellant about it, and that the appellant said he would send for the respondent, "and he will have to fix them up." He added that he did not know how many of the suits he had examined, but he thinks about half of them, and that he reported to the manager, Mr. Benn, that he had "passed" some of the suits.

Now, the plaintiff himself had already said in his testimony that, some days after he had delivered the suits, he called to see about settling, and that the appellant's manager shewed him the suits, and said "that some little things have got to be fixed up."

We consider, upon this question of sample or no sample, that the Superior Court had reason to come to the conclusion at which it arrived and that the appellant has not shewn that that conclusion is erroneous.

Then, as to the real quality of the tailoring work, the appellant and Fels, his travelling agent, have testified that the tailoring was so badly done that the suits and the cloth are worthless. The appellant also brought forward a number of witnesses who condemned the work. A clothier named Hamilton called them "the worst lot of suits that I have ever seen since I have been in the trade;" "many of them are absolutely preposterous;" "they are not worth a cent." The witness, Blumenthal, testified that "the coat is a cheap one and not so very badly made.

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. . . . As to the vests and pants, I must say that it was the most horrible butchery that I have ever seen in my life." Meyer Hyam, another witness, testified that "the coats should be passed to a certain extent, but as to the vests and pants, they were killed."

It appeared in the course of the testimony that these suits were of a cheap kind, which are commonly let out to women to be made up at their homes, and that not much finish or artistic symmetry is expected to be manifested in the product.

The respondent tendered, in rebuttal, the evidence of Henry Levine and D. A. Miller. Levine's testimony is to the effect that the tailoring was common women's work or number three work, such as one would expect at $2.35 per suit; that, on being shewn the suits by the appellant, he asked for one of size No. 38 (his own size) that he put on the suit and said to the appellant: "Look at me; don't you think it is all right? There was two other men there at the time. It fitted me all right."

The other witness, Miller, testified that styles change every six months, that the suits are now out of date; that he examined them by picking out a suit here and there from the pile and that "they seemed to be all right.". It appears that the cloth was cut in the establishment of this witness and he testified that he looked them over before delivery.

If one were merely to count the witnesses who testified that the work was bad and then count those who said it was satisfactory at the price, it is clear that the result arrived at would be one unfavourable to the respondent. Sitting here in appeal, we have not the advantage of seeing these witnesses which the learned trial Judge had. It may be that he saw reason to think that truth was on the side of the smaller number. There are, nevertheless, certain inferences which we can draw which are of assistance in arriving at a conclusion.

It has already been pointed out that the witness, Bercovitch, whose particular business it was to inspect the suits when delivered by the respondent, was quite unprepared to say how many or what percentage of the suits were fit to be accepted and how many were not fit, though he thought that he had inspected half of them and had passed some of them. It has also been pointed out that he testified that he referred the matter to the manager and that afterwards the appellant himself stated that the respondent would have to rectify some of his work, on these points corroborating to some extent the testimony of the respondent. Then again there is the significant fact that the manager, Benn, to whose decision Bercovitch was apparently ready to defer, was not brought forward as a witness and no reason was given why he was not examined. It thus appears that the man in the appellant's service, whose duty it was to examine

and inspect the suits and to decide whether they had been acceptably made or not, did not definitely reject them and is far from joining in the sweeping condemnation of the work pronounced by some other witnesses, and that the manager, who was in a position of still greater authority, has given no testimony at all.

Upon the whole it is our opinion that the appellant has not established that the conclusion arrived at by the Superior Court was wrong. The appeal is dismissed with costs exclusive of fees for attendance and argument.

Appeal dismissed.

DELANEY v. DELANEY.

Nova Scotia Supreme Court, Ritchie, J. August 12, 1912.

1. POWERS (§ II—7)—APPOINTMENT—INSUFFICIENT EXERCISE OF POWER—WILLS ACT, R.S.N.S. 1900, CH. 139, SEC. 8.

Under a power of appointment contained in a marriage settlement or deed in trust authorizing the trustee to make the appointment "by any deed or instrument in writing duly executed or by any last will and testament to be by her duly executed," the power cannot be validly exercised by a document intended to operate as a will and only prevented from operating as such by defective execution, there being only one witness, and which for that reason would be invalid as an appointment under the Wills Act, R.S.N.S. 1900, ch. 139, sec. 8.

Statement

ACTION for a declaration that a certain paper writing executed by Mary Ann Johnson in her lifetime as her last will, but which was invalid for want of proper subscription by the witnesses, was a "deed or assignment or instrument in writing duly executed" under a certain marriage settlement or trust deed.

J. J. Power, K.C., for plaintiff.
W. W. Walsh, for defendant.

Ritchie, J.

RITCHIE, J.:—The question for my opinion under the originating summons issued in this action is as to whether or not Mary Ann Johnson made a valid appointment under an indenture dated the 28th of July, 1876, and made between the said Mary Ann Johnson, then Mary Ann Healey, of the one part, and Joseph Johnson, Edward Delaney and William Delaney of the second and third parts.

The words of the indenture under which the question arises are as follows:—

> And in further trust to transfer, convey and assign and pay over all such real estate and personal property, lands, houses, and personal chattels as aforesaid and all property of whatever nature to which the said Mary Ann Healey is or may become entitled, to such person or persons and in such manner and in such shares as she the said Mary Ann Healey notwithstanding her coverture shall by any deed or

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instrument in writing duly executed or by any last will and testament to be by her duly executed notwithstanding her coverture shall direct and appoint.

Provision is then made for the case of non-appointment. The document relied on as an appointment fails as a will because it is not executed in accordance with the statute, there being only one witness. The document in question is an instrument in writing but the first question which presents itself to me for consideration is as to whether or not it is as "writing in the nature of a will." If it is I must hold that it is not a valid appointment in view of the provisions of the Wills Act. Sec. 8 of that Act provides as follows:—

> No appointment made by will in exercise of any power shall be valid unless the same is executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it has been expressly required that a will made in exercise of such power shall be executed with some additional or other form of execution or solemnity.

It is clear that this document is not executed in the manner required by the statute, there being only one witness. Section 2 of the Act provides as follows:—

> The expression will includes a codicil and an appointment by will or by writing in the nature of a will in exercise of a power and also a disposition by will and testament or devise of the custody and tuition of any child and any other testamentary disposition.

I hold the document to be a writing in the nature of a will. I think it is impossible to hold otherwise. It was intended to be a will. This is obvious on its face. It has all the characteristics of a will and is only prevented from operating as such by defective execution. The statutory definition in section 2 of the Wills Act I think settles the question, just as the corresponding section in the English Act settled the question in *In re Barnett, Dawes* v. *Ixer*, [1908] 1 Ch.D. 402.

Mr. Power admitted that his client was not of the favoured class who are entitled to aid in equity, and, apart from this, I do not think that equity could in any case nullify the express words of the statute. The validity of an appointment by will, or by writing in the nature of a will, as far as regards execution, wholly depends upon the statute. Holding the view expressed in this judgment it is not necessary for me to deal with the other legal question raised at the hearing.

I answer the first question in the originating summons in the negative.

Costs will be paid out of the fund.

Declaration accordingly.

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Nova Scotia Supreme Court, Meagher, Russell and Drysdale, JJ. March 12, 1912.

1. TIME (§ 1—7)—COMPUTATION—INSUFFICIENT JURY NOTICE—WORDS "AT LEAST," "CLEAR DAYS."

In the County Court Act, R.S.N.S. 1900, ch. 156, sec. 57, prescribing that a notice requiring issues to be tried by a jury must be given "at least fifteen days before the first day of the sittings," the words "at least" must be given the same construction as the words "clear days" and that a notice given on the 23rd October for the sittings beginning on November 7th is insufficient.

[*McQueen* v. *Jackson*, [1903] 2 K.B. 163, referred to.]

Statement

APPEAL from the judgment of Chipman, County Court Judge, striking out a jury notice on the ground that it was given too late. The notice was given October 23rd, 1911, for a case to be tried November 7th, 1911.

The appeal was dismissed.

Argument

H. Mellish, K.C., in support of appeal. The County Court Act, R.S.N.S. 1900, ch. 156, sec. 57, sub-sec. 2, requires a jury notice to be given "at least fifteen days before the first day of the sittings at which the issues are to be tried." Under the Judicature Act, O. 60, r. 5, unless the days mentioned are "clear days" you are to exclude the first and include the last. The practice and procedure of the Supreme Court apply to the County Court, R.S.N.S. 1900, ch. 156, sec. 48 (*a*), except where otherwise provided: *The King* v. *Judge of the County Court for District No. 5*, 42 N.S.R. 537.

S. D. McLellan, K.C., contra. The words "at least" in this case means the same as "clear days." Chitty's Practice, vol. II., p. 1435; *In re Railway Sleepers Co.*, 29 Ch.D. 204; Ency. of Laws of England, vol. XIV., p. 89.

Mellish, K.C., replied.

Russell, J.

RUSSELL, J.:—A notice requiring the issues to be trial by a jury in the County Court was given on the 23rd October, for the sittings beginning on November 7th. The statute chapter 156, sec. 57, R.S.N.S. 1900, requires that the notice be given "at least fifteen days before the first day of the sittings." By sec. 48 of the same chapter, the practice of the Supreme Court applies and by the rules of the Judicature Act it is provided, O. 60, r. 8, that in any case in which any particular number of days not expressed to be clear days is prescribed the same shall be reckoned exclusively of the first day and inclusively of the last day.

It is too late to argue that clear days are not expressed in the statute and therefore this rule of the Supreme Court should apply.

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The rule as to computation of time under the Judicature Act is the same as rule 174 H.T. 1853, and yet, under that rule, it was held that where an act was required by statute to be done so many days "at least" before a given event the time must be reckoned exclusively of both days.

In other words the term "at least" was equivalent to the use of the term "clear days."

To the same effect, as I read the case, is *McQueen* v. *Jackson*, [1903] 2 K.B. 163.

There were not fifteen clear days between the 23rd of October and the 7th of November, and the notice was therefore too late.

Meagher, J.

MEAGHER, J., read an opinion to the same effect, holding that the case was governed by English authority which the Court was bound to respect.

Drysdale, J.

DRYSDALE, J., concurred.

Appeal dismissed.

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EVANS v. EVANS.

Alberta Supreme Court, Walsh, J., in Chambers. August 17, 1912.

1. STAY OF PROCEEDINGS (§ I—13)—NON-PAYMENT OF COSTS OF FORMER ACTION.

An action will not be stayed by the Court merely on the ground that the costs of another action between the same parties awarded against the present plaintiff had not been paid, unless the prior action was for the same cause or for a cause of action substantially the same.

2. DISMISSAL AND DISCONTINUANCE (§ I—4)—OPPORTUNITY TO PROCEED NOTWITHSTANDING DEFAULT.

The Court will hesitate to dismiss an action for want of prosecution although the plaintiff is in default in not proceeding with the cause within the time limited by rules of Court, if the action is not a frivolous one and the plaintiff evinces a desire to proceed to trial.

3. STAY OF PROCEEDINGS (§II—11)—LAPSE OF ONE YEAR WITHOUT STEP IN CAUSE.

Even if marginal rule 973 of the English Judicature rules is in force in Alberta, a plaintiff who has not taken a step in the cause for a year and who by that rule of Court is required to give a month's notice if he desires to proceed, is not subject to have his action entirely stayed on the defendant's motion; the remedy of the latter is to apply to set aside the proceeding next taken by the plaintiff.

[As to Eng. marginal rule 973, see *Webster* v. *Myer*, 14 Q.B.D. 231; *Houlston* v. *Woodall*, 78 L.T. Jo. 113; *Taylor* v. *Roe*, 68 L.T. 253.]

Statement

MOTION on behalf of defendant to stay proceedings in the action as an abuse of the process of the Court, or in the alternative to stay the action until the costs of two other actions between the same parties awarded against the plaintiff should be paid by him or until security for costs should be given in this action.

The defendant also moved to dismiss the present action on the ground of want of prosecution alleging that no step in the cause had been taken within one year past.

C. A. Grant, in support of the motion.
S. A. Dickson, for plaintiff, contra.

WALSH, J.:—The evidence as to the non-payment of all of the costs in the action brought by the present defendant against the present plaintiff is conflicting. Mr. Grant's affidavit shews a balance unpaid in respect of them, while the plaintiff's affidavit alleges a settlement of the same in full, a statement of which there is some corroboration in the affidavits of E. B. Williams, H. H. Robertson, and W. R. Evans. Mr. Grant's statement as to the non-payment of the costs in the other action is undisputed; but the only statement that he makes is, that "the costs of the action have never been paid by the plaintiff."

There is nothing to shew that they were ever taxed; and, of course, until taxation the plaintiff could not be compelled to pay. Apart, however, from these considerations, I know of no authority for staying an action for non-payment of the costs of another action between the same parties, unless such action is for the same or substantially the same cause of action as the former. Such is not the case here. It is true that some of the same horses that were the subject-matter of the former suits are part of the subject-matter of this action. The other actions, however, were to determine the ownership of the horses, while the present litigation is over the defendant's liability for their feed and keep. Even if the non-payment of the costs of the earlier actions was admitted, I do not think that I could on that account stay this action. That part of the motion must, therefore, be dismissed.

The application for security for costs is, I suppose, based upon the general grounds taken in the summons which I have set out above. The non-payment of the costs of the other actions is not a ground for ordering security in this. There is not the slightest proof of the allegation that the plaintiff is insolvent. Even if he was admittedly so, he could not be ordered in such an action as this to furnish security for the defendant's costs.

In some jurisdictions security is ordered on this ground, if the plaintiff is not prosecuting the action in good faith on his own account, but is really carrying it on for the benefit of some one else. But that is not the case here.

There is no evidence upon which to found the assertion that the action is a frivolous one and that it is an abuse of the process of the Court. The last ground, the lapse of a year without the taking of a step, of course cannot apply to the application for security. I cannot on any of these grounds or upon this material compel the plaintiff to secure to the defendant the payment of her costs.

The application to dismiss for want of prosecution rests, however, upon a better foundation. The statement of defence

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was delivered on the 9th February, 1911, and nothing more was done until the 20th April, 1912, when the plaintiff took out a subpœna and appointment for the examination of the defendant for discovery. He gives as a reason for this delay the fact that the appeal to the Supreme Court of Canada in the defendant's action against the plaintiff, which is above referred to, was disposed of only lately, and that he was not entitled to proceed with this action until the final disposition of the other case.

He certainly was entitled to proceed, but it may have been inadvisable for him to do so, and I understood on the argument that it was in February, 1912, that final judgment was given in the other case. A further reason for the delay is given in the fact that a number of documents were being procured in Wales, without which he could not safely go to trial. He certainly shewed by the issue of the subpœna and appointment in April last that he was then preparing to go ahead, while the defendant then displayed an intention of preventing him, for the summons which I am now disposing of was taken out on the 22nd April, and it contained a stay of proceedings until the disposition of this application. As a result, nothing has been done in the case since then.

Whose fault it is that nearly four months have elapsed between the issue of the summons and its argument, I do not know, nor do I suppose that it is material. The Courts have always shewn an unwillingness to dismiss an action, which is not plainly frivolous, for want of prosecution, if any reasonable excuse for the delay in getting to trial is shewn, and the plaintiff evinces a desire to proceed with it. It has sometimes been suggested that such a motion should not be made until an intimation has been given the plaintiff's solicitor that, unless he proceeded, it would be made. That course was not taken here, but rather the opposite; for, as soon as the plaintiff shewed signs of waking up from his long sleep of fifteen months, the defendant promptly tried to put him to sleep again by taking out this summons, which has resulted in nearly four more months of slumber.

The plaintiff may set this action down for trial at the next sittings at Edmonton. If he does not do so, his action will stand dismissed with costs.

The ground taken by the plaintiff is his summons "that the plaintiff was not entitled to proceed with the action without an order of the Court, as no step had been taken for more than one year," is meant, as Mr. Grant stated on the argument, to come under Marginal Rule 973 of the English practice, which provides that "in any cause or matter in which there has been no proceeding for one year from the last proceeding, the party who desires to proceed shall give a month's

notice to the other party of his intention to proceed. A summons on which no order has been made shall not, but notice of trial, although countermanded, shall, be deemed a proceeding within this rule." Without stopping to consider whether or not this rule is in force here, although I fancy that it is, I merely repeat what I said on the argument. I do not see how an order can be made under it staying this action.

The rule itself does not stay all proceedings until the notice has been given; and it is, therefore, no authority for a stay of the entire action. It automatically stays the proceedings which it prohibits, and no order from me is necessary to implement it. If the plaintiff takes some step in disregard of this rule, I suppose that it would be set aside or proceedings under it stayed, if the rule governs our practice.

I am not asked to stay or set aside some step taken in violation of this rule, but to tie up the whole action because the defendant says that the plaintiff can do nothing more under it without giving the month's notice. This I cannot do. The result is, that the defendant's summons is discharged except the portion of it asking for the dismissal of the action for want of prosecution, in which the order will be as above indicated. The defendant is entitled to issue the order. As each party has succeeded in part, and neither party is entirely free from blame for the conditions which have brought about this application, the costs of it will be in the cause.

Order accordingly.

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June 8.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. June 8, 1912.

1. INJUNCTION (§ I F—58)—POLLUTION OF MILL POND—DUMPING DEBRIS—DAMAGES.

Not only will damages be awarded for past injuries, but an injunction will be granted to restrain the defendant from dumping debris from a quarry upon a steep declivity on land owned by or under his control, from which earth was washed into a mill pond owned by the plaintiff, which not only fouled the waters thereof but threatened as well to fill the pond itself, notwithstanding it did not appear that the plaintiff had title, either by deed or right of possession, to the bank of the pond at the place where such debris washed into it.

Statement

APPEAL by the defendants and cross-appeal by the plaintiffs from the judgment of Britton, J., 2 O.W.N. 259.

The judgment below was varied.

E. D. Armour, K.C., and *T. C. Haslett*, K.C., for the defendants.

G. Lynch-Staunton, K.C., for the plaintiff.

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GARROW, J.A.

GARROW, J.A.:—The plaintiffs own a paper mill at the town of Dundas, which has been established and in use for many years. The water used in the mill is derived from a stream flowing down through a ravine southerly across the tracks of the defendants the Grand Trunk Railway Company, the pond being to the north and the mill to the south of such tracks.

The defendants Doolittle and Wilcox Limited own land upon the table-land above the ravine, upon which they carried on quarrying operations. And, desiring a dumping ground for the surface and other débris accruing from such operations, obtained a lease from the defendants the Grand Trunk Railway Company of land which extends from the east bank of the pond upwards towards the table-land belonging to the other defendants, with the right to dump such débris upon it. And this débris, which consists largely of clay and sand, it is said by the plaintiffs, is falling or being carried down the declivity into the pond, affecting and fouling the water, and threatening the integrity of the pond itself, which, it is said, is being slowly filled up thereby.

The plaintiffs claim to be the owners of the east bank, either by paper title or by length of possession, and, in any event, that they are entitled to restrain the defendants from injuriously fouling or otherwise affecting the pond or its waters by means of such dumping.

The defendants deny the plaintiffs' title to the lands upon the east bank where the dumpings were made, and assert title therein in themselves, but do not deny the plaintiffs' title to the mill or to the pond.

Britton, J., was of the opinion that the plaintiffs had failed to prove a paper title to what he in his judgment calls the "gorge," which would, I suppose, include the east bank; but held, upon the evidence, that the plaintiffs were in possession when the lease before-mentioned was executed, and that such possession was sufficient to entitle the plaintiffs to maintain the action for the trespasses complained of; and was evidently of the opinion that the defendants had also failed to establish a paper title; otherwise it would have been necessary to determine the larger question which the plaintiffs raise, that their possession had ripened into a title under the Statute of Limitations.

The learned Judge also held that, so far, the plaintiffs had not suffered appreciable damage from the acts of the defendants, but that there was a well-founded apprehension of danger resulting from the dumps falling towards or into the stream, against which he awarded the plaintiffs the sum of $200 towards the erection of a wall to intercept such dumpings, or, in the alternative, a reference as to damages and an injunction re-

straining the defendants from trespassing on the lands of which the plaintiffs are in possession and from dumping or depositing any earth, rubbish, stones, or other material upon such lands.

There was thus no adjudication upon the question of title to the lands on the east of the pond, either on the part of the plaintiffs or of the defendants, further than the declaration that the plaintiffs are in possession.

The defendants appeal, and claim to have proved title to such lands in themselves, and also contend that, no damages having been established, they were entitled to have the action dismissed.

The plaintiffs cross-appeal, and contend that the evidence establishes a good paper title in them; and, failing a paper title, that they have proved a good title by possession; and they also claim a reference as to actual damages already sustained.

The title of the plaintiffs to the mill or to the land covered by the water in the dam, or to the use hitherto made of such water, is not in dispute.

While the action from one point of view is an action of trespass, involving the question of title to the east bank, that is not its main feature, which is a complaint of what in law would be wrongful, whether the defendants did or did not own the east bank, namely, the dumping there on a steep and rocky declivity of large quantities of material which it was probable would slide down or be washed down and thus reach and injure the plaintiffs' pond and his mill. If the land upon which this dumping was taking place was the plaintiffs', then it was trespass; but, if it was not, it was at least in the nature of a nuisance; so that, in either view, the plaintiffs were entitled to some, if not all, of the relief granted by the learned trial Judge.

These being the circumstances as they appear to me in the evidence, the case does not, in my opinion, call for an adjudication upon the question of title upon either side—a question, I may say, which has given us all much labour and anxiety in attempting to unravel the tangled mess created by years of careless and inaccurate conveyancing. The plaintiffs' relief may well, I think, stand upon that which is undisputed, namely, their right to the mill and to the pond, leaving all other questions of title to be hereafter adjusted between the parties, peaceably I hope, or by further litigation if they are foolish.

The evidence fully, in my opinion, justifies the injunction which was granted. I also think the plaintiffs were entitled to something more than mere nominal damages, which sum, to avoid the expense of a reference, I would allow at the sum of $100. And this should take the place of the $200 allowed by Britton, J., towards a protecting wall. And the present recovery should be without prejudice to subsequent suits for damages subsequently arising by reason of the acts now complained of.

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The plaintiffs should have their costs of the action, but the parties may well be left to bear their own costs of the appeal to this Court, under the circumstances.

MEREDITH, J.A.:—The question of title to the strip of land on the east side of the mill pond was left in a very confused and unsatisfactory state at the trial; perhaps one of the clearest things in connection with it is that neither side has yet proved title to that land.

On the defendants' side the deed from Somerville to Hamilton, and one of the deeds from Hamilton to the railway company, cover it; but title in Somerville is not proved.

On the plaintiffs' side, it is comprised in the metes and bounds of the deeds under which they claim title from Leeming, but seems to me to be plainly enough comprised in the exceptions contained in several of the deeds in their chain of title.

Nor can I think that title by length of possession has been proved on either side; or that any possession which would be evidence of ownership was proved.

But really the question of title to the land on that side of the pond is of no paramount, if indeed, of any substantial importance in the real matter in controversy in this action.

The real and substantial question is whether the plaintiffs' pond, stream and mill have been injuriously affected by any wrongful act of the defendants; and no question has been raised as to their title to pond, stream and mill; ownership of land on the east side of the pond would not give any right to do any of the injury complained of to pond, stream or mill; nor would ownership by the plaintiff add to such a cause of complaint. The injury to the land on that side of the pond is another cause of action which can well be left to be dealt with when the parties bring something more than a muddled title before the Court.

That at the time when this action was begun the plaintiffs had a good cause of action against the defendants I can have no doubt; the case is not to be dealt with as it is now, or was at any time after the defendants were enjoined; it must be looked at as it was at that beginning when the defendants were still dumping earth, stone, and other refuse material from their quarries on the side of the high and steep hill running up from the pond to the top of it—a hill commonly called the mountain. That work so continued must have been a serious menace to the plaintiffs' rights in the pond, which is of paramount importance to their mill.

But apart from the danger of the dumps sliding in a body into the pond, there was the ever present injury from the earth and other substances carried down by surface water, if not by spring water, from the dumps into the pond; this could not be

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injurious to the plaintiffs' property rights; it could not but foul the stream and fill in more or less the pond; while much might be carried down the stream in solution to the mill, much must in time be precipitated on the bottom of the pond. Indeed streams of mud had already, at the time of the trial, run down the hill and been projected into the pond, in more than one place, in the way the plans indicate. It is not a good answer to say that in the freshets and high waters the stream would be muddied anyway; the fact that nature cannot be enjoined from doing such injury, does not give to man the right to add to it, it may rather be a greater reason why he should be enjoined; the burden which natural causes impose is enough. And, indeed, if there had been no appreciable damage, the fact that the wrong might in time grow into a right would be an abundant reason for stopping the wrong.

The plaintiffs were, therefore, rightly enjoined from dumping as they were when the action began; and that injunction should, I think, be made perpetual; they should also pay damages, which, up to the present time, may, I think, be put very reasonably at $100. In regard to present and future danger from the old dumps, as nothing in the shape of a catastrophe has yet happened, I would make no order; but let them remain as they are at the risk of the defendants; so too as to any injury from earth or other substances brought down by surface or spring water from the dumps; if the defendants do not stop it, they will be liable in a future action for damages, and subject to an injunction if needed. The judgment should express the fact that it is without prejudice to the claims of either party to the land on the east side of the pond, as well as to any future claims by the plaintiffs for damages and an injunction.

Success being divided, I would make no order as to costs of this appeal; but the defendants should pay to the plaintiffs the general costs of the action.

Magee, J.A.

MAGEE, J.A.:—The defendant company Doolittle & Wilcox, Limited, who own a quarry, have been dumping their strippings of earth over a high cliff, upon the sloping rocky bank of a stream flowing through a gorge of which the cliff forms the easterly side—this sloping bank varies in width from three hundred to five hundred or more feet—and in places is covered with earth and vegetation, and throughout with cedar and other trees and undergrowth. The company hold a lease of this land from the defendants, the Grand Trunk R. Co., whose tracks running easterly and westerly cross upon an embankment, the mouth of the gorge, and run along the southerly face of a lofty escarpment which rises high above the north side of their tracks, and on the top of which at the easterly side of the gorge the quarry company own the land—the lease was made for the pur-

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pose of using the bank as a dumping ground. The stream flowing through the gorge from the north is dammed up by the north side of the embankment, beneath which it is carried in a culvert past the plaintiff company's paper mill, which is immediately south of the embankment and for which it supplies water as well for power as for use in the manufacture.

The earth has in large quantities been dumped in these places, about two hundred feet apart; the southerly one being about that distance north of the embankment—the plaintiffs complain that it has from its weight aided by springs beneath and surface water descended the slope, carrying with it soil, rocks, and trees, and some of it has found its way into the stream and made it muddy and unfit for paper making, and there is danger that the whole will descend and probably block the culvert and carry away the embankment, and in any case form a deposit above the dam and reduce the storage capacity of the pond which they need to provide water in dry seasons. They claim to own the whole of the sloping bank. It is part of lot 13, on the 1st concession of West Flamboro township.

Both sides claim title through Ralph Leeming, who owned in 1841, on both sides of the stream—by deed of 18th December, 1841, he conveyed 24 acres to Hugh Bennett and Robert Somerville, reserving a road. The description is given by metes and bounds and the surveyors upon each side agree upon the starting point. The north easterly boundary extends from the point where practically the south face of the escarpment and the easterly cliff of the gorge meet—and runs along "the face of the mountain," that is the edge of the cliff, 20 chains 69 links, and the north-west boundary runs 12 chains and 65 links, which would carry it across the stream—and thus include the whole of the eastern slope, the bed of the stream, and land on the west side of it. On 27th June, 1842, Hugh Bennett conveyed the same land and other land on the face of the escarpment east of it to Robert Somerville. On 25th June, 1842, Somerville mortgaged both parcels to Ralph Leeming and Susannah Leeming his wife. On the 18th October, 1843, Robert Somerville conveyed to Joseph Spencer a parcel containing over eleven acres. There is no evidence of this deed except the recital of it in the subsequent deed Leeming to Eliza E. Spencer, where it is stated to have conveyed the land therein mentioned and conveyed. Assuming that to be so, it was evidently the west part of the twenty-four acres for four westerly boundaries correspond in bearings and distances in both descriptions, and the northwest boundary, six chains and eighteen links is evidently the west end of the twelve chains and sixty-five links which formed the boundary of the twenty-four acres. The eastern boundaries seem to follow by seven different bearings the general course of the stream.

Surveyors on both sides have agreed within a few feet as to the location of these easterly boundaries, which are found to run along the easterly bank at varying distances about a chain apparently from the present edge of the water.

By deed dated 2nd July, 1851, Joseph Spencer conveyed to the Great Western Railroad Company (which was subsequently united with the defendant Grand Trunk Railway Company) 3.81 acres as delineated on a plan attached. This land formed approximately the site of the embankment and the boundaries were subsequently changed by an agreement of 31st December, 1899, being extended a short distance northerly on the east side of the stream. It does not otherwise affect the present action. But the plan shews an existing dam about 25 feet north of the land granted, and by agreement of the same date, 2nd July, 1851, the railroad company agreed with Spencer to construct their embankment so as to form the dam for his mill and so that he might raise the water seven feet higher and to give him another right of way, he having given up the right to the road intended to pass through the gorge and reserved by Leeming.

Thus the railway company's track and embankment come through the same deed as the plaintiff's title to the bed of the stream and the strip of land along its easterly edge.

On the 10th June, 1851, Robert Somerville conveyed to James Hamilton, 11 acres, 1 rood and 18 perches, the description of which is set out and covers the whole eastern bank from the edge of the cliff to the margin of the creek, the length along the cliff being 20 chains 69 links, as in the deed from Leeming. This deed would thus include the land along the eastern bank which had already been conveyed by Somerville to Joseph Spencer. It is noticeable that the north-west boundary 7 chains more or less added to Spencer's north-west boundary would exceed the 12 chains 65 links mentioned in the deed from Leeming.

Both parcels, so far as appears, would be subject to the mortgage to Leeming, but it may be that Spencer the first grantee would be entitled to throw the burden of the mortgage upon the other land. On 30th June, 1851, Somerville conveyed to the Great Western Railroad Company the parcel along the south face of the escarpment which lies east of Hamilton's land and was also in the mortgage. By deed of 31st July, 1863, reciting a sale under a decree in chancery in a redemption suit Ralph and Susannah Leeming conveyed to the purchaser Eliza Elinora Spencer, who seems to have been an executrix of Joseph Spencer's will, the land already referred to as conveyed by Somerville to Joseph Spencer, excepting the portions conveyed by Joseph Spencer to the Great Western Railroad Company and three roods conveyed to Robert Somerville with a privilege of ingress and egress and a privilege of pumping water. A

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description of the three roods is given which shews that it was about a chain wide but of varying width extending along the east margin of the creek for a distance of about nine chains south from the allowance for road reserved by Leeming. The defendants called as a witness a nephew of Robert Somerville, who says the road ran only to the old mill which was about the site of the present dam. It would seem, therefore, that the three roods excepted do not cover any of the land in question here.

The effect of this conveyance from the mortgagee Leeming would be to give Eliza E. Spencer the legal title to the land therein described, although it covered part of that conveyed by the mortgagor Somerville to Hamilton. It does not appear that Leeming had ever released Hamilton's parcel from the mortgage. Also it does not appear that Hamilton or the railroad company were parties to the redemption suit. At the trial by oversight—which they now ask and as I think should be allowed to remedy—the defendants omitted to put in a registered statutory discharge by Leeming of the mortgage of 1842. But that discharge is dated 27th November, 1871, and evidently could not affect the previous conveyance by him in 1863, if indeed it could take effect at all. I may note that it only refers to registration in Halton township and not West Flamboro.

Eliza E. Spencer thus obtained the conveyance of the land covered by the stream and the strip of about one chain wide along the eastern shore—and the railroad company owned the land between that strip and the edge of the cliff.

Eliza E. Spencer in 1863 conveyed to John Fisher who gave a mortgage back which was subsequently discharged. He conveyed in 1867 as part of his capital stock in their co-partnership to the use of himself and John Abram Fisher as joint tenants. In 1869, the sheriff under execution against John Fisher purported to convey his interest to John Abraham Fisher, but no proof of execution is offered. Whether that deed was valid or not John Abram Fisher would still have his joint interest in the property and John Fisher the joint tenant subsequently died. John Abram Fisher conveyed to Christopher Eli Fisher in 1871 an undivided two-thirds and in 1888 all his interest.

On 31st December, 1899, a rearrangement of boundaries as already mentioned was made by agreement between Christopher Eli Fisher and the Grand Trunk Ry. Co., whereby the railway company released to him "all the lands lying outside of the boundaries comprised within the description aforesaid and so delineated on said plan."

But it is evident this release was only intended to cover such of the lands in the old deed from Spencer to the Great Western Railroad Company as were not within the new railway bound-

aries. It could not be as contended for the plaintiffs reasonably construed to cover the lands here in question. His right to the enjoyment of the water was, however thereby recognized.

On 26th August, 1903, he conveyed to the plaintiff company, the deed covering *inter alia* the mill and the bed of the stream and the strip along the eastern bank, the eastern boundaries being the same as in the deed Leeming to Spencer.

He had by agreement of 31st July, 1903, agreed to sell to the plaintiff company the same land and all the rights under the agreement of 31st December, 1899, and all right to any property under the agreement for dissolution of partnership between him and John Abram Fisher dated 1st June, 1885. On 28th April, 1909, after commencement of this action the plaintiff company obtained a conveyance from the National Trust Company as executors of Christopher Eli Fisher covering all the land between the brow of the cliff and the stream and also the bed of the stream and land west of it. There is nothing to shew that under the agreement of 31st July, 1903, or that of 1st June, 1885, the plaintiffs at the commencement of the action had any equitable or other right to any land outside of the boundary in the deed Spencer to John Fisher. But they have, I think, shewn legal title to at least one-half interest in the land described in that deed and they probably have title to the other half.

That being so, the acts of ownership and possession shewn to have been exercised by them and the Fishers are quite enough to establish legal possession by them. For more than twenty years back they have had east of the creek a notice forbidding trespassers and at least one has been prosecuted; they have planted trees on the west side and some on the east side and have sown some seed of trees and have protected some of the trees by barriers around them; their cattle have pastured on the east side, crossing the stream from the west side to which they were admitted by a gate of which they had the key—no other cattle are shewn to have been there—as there is no access to the east bank from the south, except by climbing the north railway fence—which runs as far as practicable up to the peak—the only other way of getting there would be across the stream which is their property. It must, I think, be taken that they have shewn possession of all the land described in their deed from Spencer.

But that does not give them possession or title thereby to the land outside their boundary between that and the cliff.

There is that long unfenced boundary between them and the railway company. The bank is wild, rough, rocky and largely covered with trees and undergrowth. It is not shewn that any of the trees or seed put in or protected by them was outside their boundary, or that the cattle have gone beyond that boundary though doubtless wandering at will. There is nothing

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I think in the evidence to justify an extension of the presumption of full possession in the Fishers to land over which they had no claim and merely because the railway company have not had occasion to use it. The plaintiff company and the railway company stand, I think, just where Eliza E. Spencer and the Great Western Railroad Company stood with regard to each parcel. And the railway company appear to be the owners of the strip between the plaintiffs and the cliff.

But the evidence shews that the earth dumped by the plaintiffs has encroached upon the plaintiffs' side of the boundary and some of it has reached the stream over the plaintiffs' land. The evidence as to the danger of its advancing further was very contradictory. Reading the evidence, I would be inclined to agree with the learned trial Judge, that there is danger, but he had in addition the advantage of seeing the witnesses and also viewing the premises, and I can see no reason to question the conclusion at which he arrives on that question.

As the earth so far as appears was dumped upon the defendants' own land does not appear to me to be any ground for preventing them from doing that so long as they do not injure the plaintiffs' land. That injury might be from allowing the earth to be carried thereon by its own gravity or by water or putting such weight of earth as to cause the soil of plaintiffs' land to give way—or the trees or vegetation to be injured or by allowing such washing or descent into the streams as to render it appreciably less fit for the use of their mill—or cause injury or danger thereto. The plaintiffs claimed all the land up to the cliff and the judgment declared them to be in possession of it.

The judgment should, I think, be varied so as to declare the defendants entitled to the land outside the boundary in the deed Leeming to Spencer and only restrain them as to the land within that boundary from allowing any of the earth, stones or material already deposited or hereafter deposited on their land to go or be carried in solution or otherwise upon the plaintiffs' land or to foul the water in the stream so as to injuriously affect the plaintiffs.

As the quantity which has already crossed the plaintiffs' boundary is not sufficient to cause grave danger the plaintiffs will not be at the expense of a wall and I think they will be fully or more than compensated by $100 damages.

The defendants should pay the plaintiffs' costs—except of the appeal.

MOSS, C.J.O., and MACLAREN, J.A., also concurred.

Judgment below varied.

McLAWS v. SMITH et al.

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July 8.

Manitoba King's Bench. Trial before Metcalfe, J. July 8, 1912.

1. SOLICITORS (§ II C—34)—AGREEMENT AS TO DIVISION OF COMPENSATION WITH LAW PARTNER—PURCHASE OF REAL ESTATE—R.S.M. 1902, CH. 95.

A solicitor's agreement to divide with his law partner remuneration that he was to receive under a contract with a third person in respect to a real estate purchase, is not affected by the Law Society Act, R.S.M. 1902, ch. 95.

2. PRINCIPAL AND AGENT (§ III—36)—RIGHT OF AGENT TO COMPENSATION—EMPLOYED BY TWO OF THREE PURCHASERS OF REAL ESTATE—LIABILITY OF THE TWO EMPLOYING PRINCIPALS.

Where the plaintiff was employed by two of the three defendants to attend to the purchasing of an interest in lands for their benefit under an agreement that he should receive for his services one-fifth of the net profit realized from the transaction, to which agreement the third defendant was not a party and to whom notice of making such agreement by the other two defendants was not brought home, the plaintiff upon rendering such services is entitled to recover from the two defendants who entered into such agreement with him, one-fifth of the net profits realized by the three defendants.

Statement

THIS is an action for a partnership account and for payment of any sums found owing to the plaintiff upon a reference.

Judgment was given for the plaintiff for $16,618.

G. A. Elliott, for plaintiffs.
T. H. Johnson and *H. A. Bergman*, for Smith.
L. McMeans, K.C., for Correlli.
R. M. Dennistoun, K.C., for Denton.

Metcalfe, J.

METCALFE, J.:—In the action as at first constituted, McLaws sued the defendants William Smith, Frank Denton, A. H. Correlli and J. T. Huggard, alleging that prior to August in the year 1908, the plaintiff and the defendants formed a partnership syndicate to purchase and acquire from the Dominion Government a tract of land using the name of the Canadian International Colonization Co., for the purpose of making the application, but for the benefit of the syndicate; that at the time of the formation of the syndicate it was agreed that Correlli was to receive a two-fifth interest in all profits; that the defendants Smith and Denton were to receive each a one-fifth interest, and that the plaintiff and the defendant Huggard were to receive a one-fifth interest to be divided equally between them; that one Aylwin had made an application to the Government for the purchase of the said lands and that after negotiations it was agreed between the Aylwin faction and the Correlli faction that they should join hands in the negotiations for the purchase and share equally in the land obtained; that certain lands were so obtained from the Dominion Government and were sold whereby large profits were received none of which were paid to the

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plaintiff, nor any account thereof rendered; and that the defendant Correlli was a trustee on behalf of himself and the other members of the syndicate in the transaction.

Upon these allegations the plaintiff asked an account of the partnership transactions and an order that the defendant Smith, who it was alleged had received the money, should pay to the plaintiff all moneys found owing to the plaintiff upon a reference.

The defendant Huggard in his defence claimed that he was not a member of any syndicate, but that at a certain stage in the negotiations between the Department and his co-defendants he was asked by them to open up negotations with the said Aylwin, for which services he was to receive a one-fifth interest or share in the profits to arise out of the transaction. He admitted that McLaws was to receive one-half of such remuneration and claimed that his co-defendants had received large profits. He asked an account thereof and an order for payment of what might be found to be due him.

At the trial I gave leave to the said Huggard to join with McLaws as a party plaintiff and to amend the pleadings accordingly. I reserved the question of costs. The trial was then adjourned, the pleadings amended and the matter now comes again before me for trial.

The statement of claim contains substantially the original claim of the plaintiff McLaws and an additional claim in the alternative upon the grounds disclosed in the defence of Huggard in the action as at first constituted.

By their pleadings the remaining defendants, Smith, Denton and Correlli, all deny that there was any partnership syndicate as alleged. The defendants Smith and Denton deny the employment. In the alternative they say that if there was an employment the plaintiffs were law partners and set up defence under the Law Society Act.

The defendant Correlli, while, by his pleading, denying that there was a syndicate, says that difficulties did arise between the Correlli faction and the Aylwin faction. That Huggard was then employed; and that it was then agreed that Huggard should receive a share in the profits, the amount of which share is unknown to him.

What occurred prior to the 28th September, 1907, is more or less obscure. It is conceded that at that time it was the policy of the Government of the Dominion of Canada not to sell Dominion lands except to the actual settler; but that there were certain Dominion lands not useful to the actual settler by reason of such lands requiring irrigation, in which case such lands were sold *en bloc* to purchasers of reputed resource sufficient to irrigate; that for this purpose one Aylwin had applied to the

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Dominion Government to be permitted to purchase upwards of 300,000 acres of land; that he had caused some surveys to be made and had deposited with the Government a large sum of money, evidently as an evidence of his *bonâ fides* in the transaction; that he apparently was having some difficulty in satisfying the Department that he should be permitted to purchase the lands; that the defendant Correlli in some way became aware of this application and that he had stated at a meeting of the International Colonial Investment Co. in the presence of Smith and Huggard that Aylwin had made an application for this land; that his application had been turned down, and that anyone else now could make an application for such lands and purchase same from the Government. The defendant Smith contends that he believed Correlli's statement that the application of the said Aylwin could thus be brushed aside apparently without effort, and that it was agreed between himself and Huggard and Correlli that the utmost secrecy should prevail and that an attempt should be made to get these lands, or in other words, to "jump Aylwin's claim."

It appears that Huggard discussed with Denton in Toronto the opportunities that might arise to operate in western lands including these lands. On the 28th September, 1907, Denton wrote to Huggard a letter which, while referring specifically to some lands at Broadview, said: "You were good enough this summer to mention to me in a general way some western land transaction that will probably be put into shape within a short time. If the matter is now ripe and we could be of mutual advantage in any way, I should be pleased to hear from you on the subject." I think this portion of the letter refers to the Aylwin land transaction.

Afterwards Huggard wrote a letter introducing Correlli to Denton, in which he says: "You will remember my speaking to you about some 345,000 acres of land . . . . Mr. Correlli will see you in reference to this, and I am inclined to think he will offer you a contingent fee. He mentioned to me $25,000. If you go over the matter and see whether or not it can be arranged you might tell me frankly whether or not you think it good. . . . . Mr. Correlli is going to Toronto to see you in this matter at my suggestion and will call upon you." Correlli not arriving at Toronto as soon as expected Denton wrote to Huggard stating that he would not like to take the matter up without first getting all the necessary surrounding circumstances. Huggard replied giving him certain information then within his knowledge and shortly afterwards, having seen some letter, not produced, from Denton to Correlli, wrote to Denton: "Until your interest, Mr. Correlli's and mine is put into writing sufficiently certain, I wish you would see that this is held up and

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does not go through. . . . . Try and get the concession outlined in Mr. Correlli's last letter; but this concession should not be granted until your interest and ours are put into writing."

Some six months later Huggard wrote to Correlli that he had approached Aylwin, apparently with the idea of both parties working together; that Aylwin had said that there were some 383,000 acres, and appeared to be willing to make a division so that the Correlli faction would receive recognition in the deal. This brought forth a reply in which Correlli says: "The Aylwin people have not the slightest chance of ever being able to secure control of the land. . . . . Please keep off until you are told that we are safe. Denton is doing yeoman's work and must not be interfered with." I have no doubt that Correlli informed Denton of this correspondence.

It appears that after Correlli met Denton in Toronto, Denton caused an application to be made to the Government to purchase these lands in the name of the Canadian International Colonization Company. Counsel for all parties admit that this application subsequently vested in Correlli the same as though such application had been originally made in his name.

However, it transpired that Correlli, Denton and Smith were altogether too sanguine concerning the Correlli application.

The defendant Smith claims to have advanced to the defendant Correlli money from time to time for the said Correlli's expenses upon a general agreement that he was to receive his money back and one-half of the profits of all the land transactions of the defendant Correlli. Smith attempts to support the claim that he was to receive such interest in these lands by a letter signed by Correlli; but in his evidence at the trial he says that there was a special agreement with Correlli concerning these specific lands whereby he was to receive one-third. This agreement is not shewn to have been disclosed to Huggard.

However, as Denton's and Correlli's hopes of ultimate success grew less Smith's anxiety increased, and August, 1908, found Smith, Correlli and Denton in Toronto, evidently then of the opinion that in all probability they could not get the land at all. Smith claims that Denton and Correlli laid the blame upon Huggard. Huggard was then on his way home from Boston to Winnipeg, and happened to see the parties in the King Edward Hotel. Smith claims that he said: "Well, if Huggard has got you into this difficulty, why not let him get you out of it?" I have no doubt from what then occurred that both Denton and Correlli had little hope of making anything out of the transaction. Smith had advanced money to Correlli and was naturally interested even to protect such advances in seeing that Correlli made a profit. I have no doubt that Smith was intensely interested and desirous of seeing Correlli make a profit.

Huggard says that, arriving in Toronto, he saw Smith, Denton and Correlli. I have no doubt that at this point Smith, Correlli and Denton had arrived at the conclusion that the only way to acquire an interest in these lands was to join hands with the original applicant. I have no hesitation in saying that I think this was the only way at any time that Correlli could have hoped to have made any profit.

I have no doubt that Huggard, having opened negotiations with the Aylwin faction, all these parties thought that he was the individual who should continue negotiations. At that time neither Correlli, Denton nor Smith seemed to know who was behind the Aylwin application. Huggard says that Correlli asked him to go to Ottawa and see Aylwin and try and reopen negotiations; that Correlli then promised him that if matters were brought to a successful termination Huggard would get one-fifth of the net profits of the transaction. Huggard says that he saw Smith and told him what Correlli had said and that Smith agreed to it.

It appears, however, that he did not specifically state to Denton, nor did Denton specifically agree with him that he was to receive any definite share of the net profits.

I am unable to accept the evidence of the defendant Smith when he denies Huggard's statement of the interview at Toronto. I believe that he was well aware of the agreement between Correlli and Huggard, and that he agreed thereto; but I cannot find that the defendant Denton is bound by any such agreement.

Huggard did go to Ottawa. He ascertained that one Robert, a man evidently of considerable financial importance in Montreal, was behind the application of Aylwin, and was the man with whom negotiations must be carried on. He journeyed to Montreal and interviewed Robert. He says that he practically arranged the matter with Robert, so that all Denton and Correlli had to do was to come to Montreal and close the deal. He telephoned to Toronto to Correlli and reported. Denton and Correlli came to Montreal. Huggard had arranged an interview with Robert. The very day that they arrived the arrangements were completed with Robert, and on that same day or on the next morning the document by which both of these factions joined hands was reduced to writing and executed.

From these circumstances I cannot but conclude that Huggard was the moving factor in closing the negotiations.

About that time Correlli signed a letter addressed to Denton, saying, amongst other things, as follows:—

> The agreement between you and me is that your interest is equal to mine, and that from time to time as money, bonds, shares of stock, assets and other securities come to me, I am to transfer to you as

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yours absolutely one-half of same. The term "you" includes any partners you may have, and the term "I" includes any partners I have.

I do not think that this was communicated to either Smith or Huggard.

Denton says that when that was executed it was agreed between him and Correlli that Correlli was to look after all west of Lake Superior and he was to look after all east of Lake Superior, thus attempting to explain the use of the term "partners."

At a later date, according to the arrangement made by Correlli and Denton with Robert, it became necessary for Correlli to pay a large amount of money. This money was advanced by Smith. An agreement concerning this, bearing date 15th September, 1909, was executed by Smith, Denton and Correlli; but it does not appear to have been brought to the attention of Huggard. Under this agreement the parties thereto agreed that the interest of William Smith should be one-quarter, Correlli one-quarter, and Denton one-half.

Huggard seems to have made various attempts to get his interest defined, but in so far as Denton is concerned, he does not appear to have disclosed to him what his claim was until about a year after he was employed in Toronto when he and Denton and Correlli were walking down Bloor Street. It appears that it was understood between Huggard, Correlli and Denton that some agreement was to be drawn defining Huggard's interest and such was apparently drafted and enclosed with a memo. (exhibit 39), in Denton's handwriting, which says:—

> Since you left I have been thinking over the little document you and I drafted, and which you were to engross and have signed. I fear it is not fair to Mr. Cl.... This feature did not appeal to me until it was too late to mention it to you before leaving, although I admit you mentioned it to me.

This draft agreement is not produced. Huggard says that during the discussion and when he made a claim for an interest Denton said he would look after Huggard's interest, but from this conversation and from the surrounding circumstances I am unable to find that this statement meant anything more than that he would see to getting it arranged and I think the correspondence and circumstances throughout are quite as consistent with Denton's claim that Correlli had to look after Huggard as with the plaintiff's claim that they were mutually interested with Denton.

The lands were sold realizing for the Correlli faction $135,050.16. Of this $47,545.08 was paid to Denton and the balance to William Smith. Nothing was paid to Huggard.

While in Toronto Huggard told McLaws, in the presence of Correlli, that he, McLaws, would receive half of Huggard's

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remuneration. It is true that Huggard and McLaws were law partners. Considering the nature of the employment, however, and considering all the circumstances, I do not think I should give any effect to the defences under the Law Society Act.

At the trial it was conceded by all defendants that Mr. Huggard should receive some remuneration for his services; but each defendant claimed that some other defendant should pay such remuneration.

I find that Correlli and Smith employed Huggard in Toronto and agreed to give him one-fifth of the net profits.

I further find that Huggard performed the services for which he was employed.

As between Denton, Correlli and Smith, Denton was to get half the net profits. With the sanction of the other defendants Denton received $47,545. I think I may safely assume that the net profits were twice that amount, or $95,090.

Counsel for the plaintiffs has stated that he is willing to deduct from that amount a claim of $12,000 for Correlli's expenses, leaving the total net profits of $83,090.

There will be judgment for the plaintiffs against the defendants Smith and Correlli for $16,618, and costs from the amendment. The defendants Smith and Correlli will have the costs up to and including the hearing at which I allowed the amendment. As against the defendant Denton the action will be dismissed with costs.

Judgment for plaintiffs.

RUDD v. MANAHAN.

ALTA.

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Aug. 17.

Alberta Supreme Court. Trial before Walsh, J. August 17, 1912.

1. COVENANTS AND CONDITIONS (§ III C 2—52)—COVENANTS RUNNING WITH THE LAND.

Covenants in a lease which touch or concern the land run with the land and are binding upon the assignee of the term demised.

2. LANDLORD AND TENANT (§ II E—36)—ASSIGNMENT OF LEASE—RESTRICTIVE COVENANT AS TO HOTEL—"TIED" HOUSE.

A covenant contained in a document separate from the mortgage given by the owner of the realty upon procuring a loan from a brewing company upon his hotel property whereby such owner and his tenant in occupation of the hotel severally agreed for valuable consideration with the brewing company that neither they nor their assigns would, during a specified period, sell or deal in or allow to be sold or dealt in upon the demised premises any brewing products other than those dealt in by the brewing company, is a covenant running with the land which may be enforced by injunction at the instance of the owner against a purchaser of the lessee's interests in the premises where such purchaser took with notice of such restrictive agreement, although the agreement was subsequent to the making of the lease itself; the benefit of which the purchaser had acquired, and although it did not appear that the making of such restrictive agreement was a condition upon which the lease was granted.

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3. ASSIGNMENT (§ III—28)—OBLIGATION OF ASSIGNEE AS TO RESTRICTIONS.

Where one acquires property by gift or purchase from another with knowledge of a previous contract lawfully and for valuable consideration made by him with a third person to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller.

[*De Mattos* v. *Gibson*, 4 DeG. & J. 282, followed.]

4. ESTOPPEL (§ III E—73)—COVENANT NOT TO ASSIGN OR SUB-LET—LESSOR'S DEALINGS WITH NEW OCCUPANT—WAIVER.

If the lessor of hotel premises, having a covenant against the lessee's assignment of the lease and against sub-letting, encourages negotiations between the lessee and third parties to whom the lessee was arranging to sell out the hotel business with the lease of the hotel premises and the lessor's assignee of the rent, with the lessor's knowledge and consent, receives several months' rent from the new occupants, the lessor will be estopped from setting up the terms of such covenant against them.

Statement

TRIAL of an action for the reformation of the lease of a hotel and for an injunction.

Judgment was given for the plaintiffs.

J. C. Brokovski, for the plaintiffs.

J. W. Macdonald, for the defendants.

Walsh, J.

WALSH, J.:—By lease dated on the 19th September, 1910, the plaintiffs demised and leased to the defendant Manahan lots 3, 4, and 5 in block B, Bellevue, "also all hotel stables and outbuildings erected thereon" for three years, with a privilege of five years longer at the same price, and also an option at any time at a price agreed upon.

The printed form contained the usual covenant against assigning or subletting without the leave of the lessors; but in the lease, as it now stands, the words "will not" have been struck out and the written word "may" substituted, which, with other appropriate changes in the wording of the covenant, convert it into an absolute and unqualified right in the lessee to assign or sublet without the lessors' consent. By assignment dated on the 17th August, 1911, Manahan assigned this lease to the defendants Grafton and Evans, who have ever since been and now are in possession under it.

The plaintiffs complain that, by mistake, a building, used as a store and dwelling, which stands upon the land described in the lease, was not excepted from it, and they ask for a reformation of it accordingly, and for an injunction restraining the lessee and his assigns from interfering with their possession and that of their tenant of this building and from collecting or attempting to collect the rental of the same. A careful consideration of all the evidence satisfies me that this complaint of the plaintiffs is well founded.

I have no doubt but that it was not the intention of the parties that the lease to Manahan should include this building, and I so find. I am convinced of the correctness of this view upon the evidence as a whole; and, besides, the plaintiffs' contention appeals to me as the more reasonable of the two under the circumstances. Some months before this, they rented the same land to Manahan for $100 per month. This lease proved abortive. Then they expended about $7,500 in enlarging the hotel and erecting the building in question. The rent reserved by the new lease is $150 per month. This increase of $50 per month, when reduced by the payment of taxes, insurance premiums, and other out-goings for which the plaintiffs are liable, is not, to my mind, an adequate return from this investment, particularly when its precarious nature is taken into account. The plaintiffs rented the store for $25 a month, which, added to the $50 increase in the defendants' rent, makes a sum which is not more than the plaintiffs might reasonably expect their investment to yield them. The plaintiffs were living in this building when the lease to Manahan was made. They were not disturbed in their possession, nor were they made to pay rent. Manahan regularly paid his monthly rent without any abatement from it on account of the plaintiffs' occupancy of this building.

The description of the demised premises in the lease, which was undoubtedly read to the plaintiffs before they signed it, must, I think, have conveyed to their lay minds the idea that it did not cover this building, for it is not an "hotel stable or outbuilding," and they might reasonably think that it was only buildings of this description that passed under it. Beebe, who drew the lease, says that the change from $125 to $150 per month, which appears in Manahan's copy of it, was made because, as originally drawn, it did not cover the store, and the rent on that basis was agreed upon at $125; but that afterwards, and before execution, it was agreed that Manahan should take the store as well, and the rent was thereupon increased to $150. This is manifestly untrue. Other changes would necessarily have been made in the lease if this was so, such as in the description of the premises and in the aggregate amount of the rent reserved for the entire term. No such changes were made, however. A reading of Manahan's examination for discovery satisfies me that his claim to the store was an afterthought on his part, induced by the idea that, upon a strict reading of the lease, the three lots and everything on them passed under it. While it is not necessary so to find, I am satisfied that Grafton and Evans knew of the plaintiffs' contention before they took the assignment of the lease; and I have, therefore, less compunction than I otherwise might have in deciding, as I do, this issue in the plaintiffs' favour.

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The plaintiffs allege that the right to a renewal to which I have referred and the clause allowing an assignment without their consent were not in the lease when executed by them, or, if they were in it, they were improperly inserted without their knowledge or instructions, these terms having formed no part of the agreement arrived at with Manahan. They ask to have the lease reformed by the deletion of the right to renew and restoration of the covenant against sub-letting to its original form as printed in the document. They also ask that the defendants Grafton and Evans be dispossessed, they being in possession as assignees of Manahan without the plaintiffs' consent. They are not, in my judgment, entitled to any relief on this branch of their case. While it is not quite clear what the arrangement was between them and Manahan on these two points, before the instructions for the lease were given to Beebe, the evidence is, in my opinion, overwhelmingly in favour of the defendants' assertion that they were both agreed to then; that the lease containing the provisions in question, as they now stand, was read over to them before they executed it; and that they quite understood the concessions that were being given Manahan under them. In any event, I do not see how Grafton and Evans could be dispossessed, even if effect was given to the plaintiffs' contention.

The plaintiffs knew of the negotiations that were going on between these men and Manahan for an assignment of the lease, and they not only refrained from advising them of their present contention, that Manahan could not assign without their written consent, but they actually encouraged them to complete the deal with him, being anxious to get rid of Manahan, who had made himself distasteful to them. Not only that, but these men have regularly paid the monthly rent reserved by the lease ever since it was assigned to them. True, this rent was paid to the brewing company, to whom it was assigned by the plaintiffs, but it was so paid with the full knowledge and consent of the plaintiffs.

This course of conduct would undoubtedly work an estoppel against them, which would make it impossible for them to dispossess these defendants, even if this covenant in the lease was restored to its original printed form. I must, therefore, refuse the plaintiffs the relief which they ask in both of these respects.

There is a variance in several respects between the two copies of the lease. The plaintiffs' copy (exhibit 5) must be made to correspond to the defendants' copy (exhibit 10) by inserting the date of the commencement of the term, the amount of the monthly rental, and the date of the first payment. The clerk will fill in these particulars before handing the exhibits out.

Other claims to relief are made by the statement of claim, all of which are incidental to the two principal contentions of the plaintiffs, with which I have already dealt. These are either concluded by the above findings or were abandoned by counsel for the plaintiffs or dismissed by me at the trial.

In December, 1910, three months after the lease was made, the plaintiffs borrowed $4,500 from the Lethbridge Brewing and Malting Company Limited, securing the repayment of the same by a mortgage upon this land. By written agreement under seal, to which the plaintiff Barbara Rudd, the defendant Manahan, and the brewing company are parties, Mrs. Rudd and Manahan covenanted with the company that they would not nor would either of them or their assigns, for the next ensuing three years, sell, dispose of, or deal in or allow to be sold, disposed of, or dealt in, upon the demised premises, any beer, lager beer, aerated waters, or brewing products, except those manufactured or dealt in by the company. Default in performance of this agreement is thereby declared to make the amount secured by the mortgage payable forthwith. The mortgage itself, which was recorded in the proper land titles office in the same month, contains similar provisions.

There is no reference whatever in the lease to this agreement. It appears to have been negotiated and completed subsequent to the lease; or at any rate there is nothing to shew that the making of this agreement was a condition upon which the lease was granted.

There is some dispute as to whether or not Grafton and Evans knew of this agreement when the lease was assigned to them. I find as a fact that they did. Mrs. Rudd and her daughter, Mrs. Boutrey, swear that Evans was informed of it before his purchase was completed, and it is plain from the evidence of Evans and Manahan that he did know of it. The agreement in question contains as well an assignment to the company of the rent reserved by the lease; and Grafton and Evans, knowing of this assignment, have regularly paid their rent to the company. Grafton and Evans have admittedly not lived up to this agreement, having purchased from this company but a comparatively small percentage of the various classes of liquors covered by it. The plaintiffs allege that this failure on the part of these defendants to carry out this arrangement has placed the company in a position to insist upon the immediate payment of their indebtedness; and, failing it, to bring about a foreclosure of the plaintiffs' equity of redemption in or sale of the mortgaged premises, and that the company are threatening to call in this money. They argue that these defendants are bound by this agreement to the same extent as was their assignor, Manahan, and they seek an injunction to restrain any further breaches of it by them.

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There can, I fancy, be no doubt but that the company could have restrained Manahan from a breach of this covenant; but, in view of the fact that his interest in the hotel is ended, the pursuit of that remedy against him would, of course, be ineffectual to relieve the plaintiffs from the difficulties with which they are forced. Unless Grafton and Evans can, in like manner, be enjoined at the suit of the plaintiffs, the latter would appear to be at the mercy of the company, even though they are in no sense to blame for the breaches of which they complain. Had this covenant been entered into with the plaintiffs and embodied in the lease itself, it would undoubtedly have bound the assigns.

The rule of law which was laid down centuries ago in *Spencer's Case*, 5 Co. Rep. 16*a*, 1 Smith's L.C., 11th ed., p. 54, is, that covenants which touch or concern the land run with the land and are binding upon assignees of the lease. In none of the many reported cases of later date upon this subject has the propriety of this decision been called in question. The dispute has arisen in every instance over the application of it; and, when once the decision has been reached that the covenant in question touched or concerned the land, the burden of the covenant has attached to the assignee.

It has been conclusively decided in England that such a covenant as that in question here touches or concerns the land. The earlier cases are *Tatem* v. *Chaplin*, 2 H. Bl. 133; *Clegg* v. *Hands*, 44 Ch.D. 503; and *Fleetwood* v. *Hull*, 23 Q.B.D. 35. These cases are discussed and followed in *White* v. *Southend Hotel Co.*, [1897] 1 Ch. 767, which is the latest authority which I have found or been referred to. In that case the lease contained a covenant by the lessee with the lessor that he would not, during the term, buy or sell on the premises any foreign wines other than should have been supplied by the lessor, his successors or assigns. This lease was assigned by the lessee to the defendant. On appeal from Kekewich, J., it was unanimously held, affirming his judgment, that this covenant touched the land and bound the assign though not named. Lindley, L.J., says (p. 771):—

> It seems impossible to say that the tenant's assign is not bound by this covenant. It is a covenant restraining in fact the lessee and his assign (although not named) from using this property in a particular way. In the old language which we are accustomed to with reference to matters of this kind, that is a covenant "touching the land."

And Rigby, L.J. (p. 774), says:—

> It is the nature of a covenant far more than the question whether or not the assign is mentioned in it which determines whether it shall run with the land or not. There are some intermediate cases in which one does not really know from the nature of the case whether the covenant is intended to extend beyond the first lessee or not; but

> where, as here, you find a covenant of such a nature that it directly affects the use of the demised premises in a manner which the lessor chooses to assume will be beneficial to him, it seems to me that, in accordance with general principle, the covenant ought to run with the land, whether the word "assign" is used or not.

This decision does not seem to have ever been questioned. The last reference to it which I have found is in *Chapman* v. *Smith*, [1907] 2 Ch. 97, in which it is referred to with approval.

In *Courage* v. *Carpenter*, [1910] 1 Ch. 262, where the same form of covenant was under consideration, in an action against an assign of a lease, the question does not seem to have been raised as to whether or not the covenant bound the defendant, it being evidently taken for granted that it did.

The only question then is, can the defendants Grafton and Evans, as assigns of the lease, use the demised premises in utter disregard of the terms of this covenant, simply because it is contained in a separate writing, which was not entered into until after the making of the lease? I do not think that they can. I have already found that they took with notice of this agreement. It is a perfectly lawful agreement, made for valuable consideration, against a breach of which Manahan could have been enjoined. I do not see how, upon the facts as I have found them, this covenant, which touches the land, can lose its efficacy simply because the right to occupy the premises has fallen into the hands of parties, other than the covenantor, who knew of the agreement before they took over the lease. As Lord Justice Knight Bruce says in *De Mattos* v. *Gibson*, 4 DeG. & J. 282:—

> Reason and justice seem to prescribe that, at least as a general rule, where a man by gift or purchase acquires property from another with knowledge of a previous contract lawfully and for valuable consideration made by him with a third person to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller.

In my judgment, the plaintiffs are entitled to an injunction against the defendants Grafton and Evans restraining further breaches of this agreement. No damage has thus far resulted from the breaches of which these defendants have thus far been guilty. The plaintiffs have substantially succeeded, and are entitled to their costs against the defendants Manahan, Grafton and Evans. The defendant Raynor was neither a necessary nor a proper party to the action, and the plaintiffs will tax no costs occasioned by joining him as a defendant. He was the tenant of the disputed store. No relief was claimed against him, and it was not necessary to the relief awarded the plaintiffs on that branch of the case that he should have been before the Court.

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He did not appear, and is, therefore, entitled to no costs. The brewing company did not appear, and will, therefore, have no costs. I do not think that the real defendants have been put to any additional costs by the claims made against them in which the plaintiffs have failed; and there will, therefore, be no set-off of costs to them.

Judgment for plaintiffs.

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CRAM v. BIEHN.

Saskatchewan Supreme Court. Trial before Lamont, J. August 23, 1912.

1. BROKERS (§ II A—7)—FIDUCIARY RELATIONSHIP—RIGHT OF OWNER TO RECOVER AMOUNT REALIZED ON SALE—EXCESS OVER NET PRICE.

A real estate broker with whom the owner of land had listed the same for sale at a price net to the owner at a certain amount per acre plus the broker's commission at a certain figure per acre, secured, without informing the owner, a purchaser through a third person at a higher price per acre than the net price to the owner plus the owner's commission, and agreed to give the third person such excess for his commission, and was paid a cash price from which he subtracted his commission and the excess over the net price of the whole of the land, the owner of the land sold, in an action brought by her for the balance of the cash payment less the commission she promised the broker, is entitled to recovery.

Statement

IN this case the facts are not in dispute. The plaintiff, who was the owner of the east ½-23-33-24 west 2nd. listed the said land through her husband W. M. Cram with the defendant, a real estate agent, at Guernsey, for sale. The price at which the defendant was authorized to sell was $15.00 per acre plus his commission of 50 cents per acre. On or about 22nd July, 1910, one W. R. Briggs, a real estate agent of Stillwater, Minnesota, called on the defendant and asked if he had any good land for sale. The defendant mentioned the plaintiff's half section which was for sale at $15.00 per acre net to plaintiff. Briggs said he had a purchaser who he thought would buy it, but also said that in case of a sale he (Briggs) would have to be protected for $2.00 per acre. Briggs then introduced to the defendant his purchaser who was a Benjamin Holmes, also of Stillwater, Minnesota. Holmes asked the defendant if he had the plaintiff's half section for sale. The defendant said he had and that the price was $17.00 per acre with a cash payment of $1,920.00. Holmes said he would take it and gave to the defendant his cheque for $1,920.00, and the defendant drew up a contract between William Cram and Holmes, which Holmes executed. On July 24th, the defendant telegraphed William Cram as follows: "Sold east half, twenty-three, am sending contracts."

About ten days later defendant sent the contract signed by Holmes to a bank in Berlin with a draft in favour of Cram for

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$1,120.00, with instructions to hand it over on the execution by Cram of the contract with Holmes. Cram went to the bank upon receiving notice from the bank people that they held the contract, but as the cash payment set out in the contract was $1,920.00, and the draft accompanying the agreement was only $1,120.00, he asked the bank to hold the document until the next day when he expected some advice from the defendant.

Next day, not having heard from the defendant, and the bank refusing to hold the document any longer, Cram executed the contract and immediately wrote the defendant calling his attention to the fact that the cash payment sent was $800.00 short of that set out in the agreement, and asking him to send it on, less his commission of $160.00. On the same day, but after he had sent the letter last above mentioned, Cram received a letter from the defendant dated August 6th in which the defendant stated he had sold the land to a man from St. Paul at $15.00 per acre with cash payment of $4.00 per acre, and that the St. Paul man had resold to Holmes, and that instead of making out two contracts they had drawn one contract direct from Cram to Holmes, and that the first purchaser had taken his profit, which was $2.00 per acre, out of the cash payment.

Not being satisfied with this explanation Cram two days later wrote the defendant demanding full particulars. To this he got no answer. On August 25th he wrote again, and a few days later received a letter from the defendant dated August 23rd in which he repeated what he had said in his former letter, and also stating that the extra $2.00 per acre had never been paid to him, but had been retained by the original purchaser from the defendant.

Cram made enquiries and found that the statement of the defendant that he had sold the land at $15.00 per acre was not in accordance with the facts, and that the only sale made by him was to Holmes at $17.00 per acre. The plaintiff then brought this action for the balance of the cash payment made to the defendant less $160.00 which she allowed as commission on the sale. The defendant disputed the claim on the ground that he had paid the $2.00 per acre to Briggs on September 17th.

Judgment was given for the plaintiff.

G. F. Blair, for plaintiff.
A. M. McIntyre, for defendant.

LAMONT, J.—On the above facts, I am very clearly of opinion that the plaintiff is entitled to succeed. When an agent sells land for the owner thereof, the purchase money belongs to the vendor, and must be paid over to him unless he agrees that the agent may retain the same or a portion thereof, in which case the agent

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may retain the amount, but only the amount so agreed upon. Here the defendant received $1,920.00 as part purchase money for the plaintiff's land. That purchase money belonged to the plaintiff. All that she had agreed to allow the defendant out of that was 50 cents per acre, or $160.00. The rest the defendant must account for. He had no right whatever to pay $2.00 per acre to Briggs out of the plaintiff's money without her consent, and the fact that he sold the land at $2.00 per acre more than the plaintiff was willing to take makes no difference. It was his duty to get the best price he could for the plaintiff's land, and in getting $17.00 per acre he did no more than his duty. When the sale was made, the cash payment received on account of that sale was the plaintiff's and the defendant must account for it, less the $160.00 which the plaintiff agreed he might retain as his commission.

There will, therefore, be judgment for the plaintiff for $640.00 and costs.

The plaintiff also claimed for certain expenses incurred in visiting Holmes for the purpose of obtaining necessary information upon which to found this action. This claim I disallow; the plaintiff had sufficient information to enable her to proceed without incurring this expenditure.

Judgment for plaintiff.

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BUCKNALL v. BRITISH CANADIAN POWER CO.

Ontario High Court. Trial before Middleton, J. April 23, 1912.

1. DAMAGES (§ III K—220)—MEASURE OF DAMAGES FOR OVERFLOW—FLOODING A MINE—CERTIFICATE OF MINING RECORDER—WATER POWER COMPANY—61 VICT. (ONT.) CH. 8.

The owner of certain mining claims for which a certificate has been issued by a mining recorder shewing that all the requirements of the Mining Act of Ontario, 8 Edw. VII. ch. 21, had been complied with, though the title thereto acquired was inchoate because the Government charges had not been paid, may recover damages for the wrongful flooding of the mining claims by the raising of the waters of a certain river by a dam constructed by a water power company holding a lease from the Crown of a water power location on the river, granted pursuant to 61 Vict. (Ont.) ch. 8, though the waters of the river had not been raised to a height exceeding that authorized by the lease, which lease, while it conferred the right to flood any Crown land along the river and its expansions, contained another provision that the lessee should not, by virtue of the lease, have the power to overflow or cause to be overflowed any lands other than those demised.

2. WATERS (§ II D—95)—LIABILITY OF WATER POWER COMPANY—OVERFLOW—RIGHT TO FLOOD CROWN LANDS—FLOODING A MINE—LEASE EFFECTED AFTER LOCATION OF MINING CLAIMS.

A water power company's rights in a lease to it by the Crown of a water power location on a certain river made pursuant to 61 Vict. ch. 8, which lease also conferred the right to flood any Crown lands along the river and its expansions, do not relate back to the time of making

its original application so as to make its rights superior to those of the owner of certain mining claims located after the making of the application but before the granting of the lease, and therefore the water power company has no right to flood such mining claims by the raising of the waters of a river by a dam constructed by it under the alleged authority of the lease.

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Statement

ACTION by the owners of certain mining claims for damages sustained by flooding occasioned by the construction by the defendants of a dam upon the Mattabitchewan river.

The action came on for trial before MIDDLETON, J., and a jury, at North Bay, on the 9th April, 1912, when it was arranged that the jury should ascertain the extent of the injury done by the defendants, and that the learned Judge should try all the other issues without the jury.

Judgment was given for the plaintiff.

S. A. Jones, K.C., for the plaintiffs.

J. Lorn McDougall, for the defendants.

Middleton, J.

MIDDLETON, J.:—By instrument dated the 29th May, 1909, the Crown leased to the Mines Power Limited a water power location upon the river in question, the limits of which are defined upon the plan attached thereto. These limits do not include the plaintiffs' mining locations. The lease was granted pursuant to the statute 61 Viet. ch. 8, and the regulations passed pursuant to the Act. It contains a clause—13—providing that the lessee shall not, by virtue of the lease, have power to overflow or cause to be overflowed any lands other than those demised, and providing that, if any such lands are overflowed or damaged, the Crown shall be in no way responsible for damage done to the owners. It also confers the right to flood any Crown lands along the river and its expansions.

Prior to the granting of this lease, the mining claims in question had been located: the discovery being, in the case of four of the claims, March, 1908, and in the case of the fifth claim, May, 1908. The working conditions were duly complied with in the case of each of these claims; and on the 4th March, 1912, certificates were issued by the mining recorder shewing that the requirements of the Mining Act had been fully complied with.

The main work done on these claims was the sinking of a small shaft near the surface of the water of Bass lake. When the dam was erected by the defendants, it raised the water forty feet. It is admitted that the water was not raised to an amount exceeding that authorised by the lease. As a consequence of the raising of the water, the work that had been done upon the mining claims was completely lost. The plaintiffs were entitled to obtain a patent for their claims, but did not do so, because this involved the payment of the Government charge, and it is said that they refrained because of the complete destruction of all real value in the claims by the flooding.

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The Mining Act recognises a mining claim as a property right. It is true that this right is in a sense inchoate; but, upon compliance with the requirements of the statutes, it ripens into a full title; and I think that the destruction of the value of the mining claim, although the title is inchoate, is an injury for which an action will lie. The title of the owner of the mining claim had its inception in the discovery and the recording of the discovery.

It is said that the water power company made application for the lease in 1907, prior to the plaintiffs' discovery; and that, by parity of reasoning, its rights ought to date back to the date of the original application; and, therefore, would be superior to the rights of the plaintiffs. I do not think that this follows. It may well be that the Crown lands office will deal with applicants for power leases in the order of their priority; but the application for the lease confers no title whatever; it gives no right to the applicant, and his title is derived from the lease, and from the lease alone. When the lease purports to give, as it does, "the right to overflow any Crown lands along the shore of the Mattabitchewan river and its lake expansions and tributaries," I think that this is not intended to derogate from or interfere with the inchoate title of the locatees of mining claims; nor do I think that it would be competent for the Crown to defeat this statutory title by any lease.

I left the question of damages to the jury; and, while they have awarded the amount sworn to by the plaintiffs as having been expended upon the property, I asked them upon their return if they intended to allow the items so claimed. They told me that they did not; that they had allowed the same amount, setting off the value of the claim, as a claim, against the exaggeration of the amount expended in the statement put in. They also explained to me that they had not included in the sum named the value which they fixed for the wood upon the flooded land. This amount, at the figures given by the jury—forty cords per acre, 25 cents per cord, for the forty flooded acres—would give an additional sum of $800; so that the damages would be $3,627. I can see no reason why the plaintiffs should not be allowed for the timber.

Judgment for plaintiff.

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Aug. 29.

Nova Scotia Supreme Court. Trial before Ritchie, J. August 29, 1912.

1. EVIDENCE (§ XII A—920)—SUFFICIENCY OF EVIDENCE—CORROBORATION —INHERENT PROBABILITIES OF TRUTH.

When the sole witness is an interested party and is giving evidence with respect to what took place between him and a deceased person it is a safe and judicious general rule to require corroboration, but there is no hard and fast rule to prevent a Judge or jury from action upon such evidence though not corroborated, where the inherent probabilities of the case are in favour of the truth of the evidence.

2. FRAUDULENT CONVEYANCES (§ III—10)—AGREEMENT TO GIVE SECURITY —PREFERENCE—FINDING IN FAVOUR OF THE AGREEMENT.

A pre-existing agreement, to give security for goods supplied to a person who is about to engage in a hazardous business, even though somewhat vague in its terms, where the finding is in favour of the making of such agreement, is sufficient to support conveyances which would otherwise be treated as made with intent to give an unjust preference.

3. EXECUTORS AND ADMINISTRATORS (§ IV B—95)—CONTROL BY COURT— GROUNDS FOR GRANTING AN ADMINISTRATION ORDER.

Where a person who held certain real and personal property under conveyances from the deceased which were admitted to have been made to him in trust for the grantee and other creditors of deceased was also the executor of the decedent's estate, but his conduct, in dealing with the property, was consistent only with the assertion of an absolute title and he had neglected for a long time to prove the will or to file an inventory of the estate, or to have the estate appraised, those circumstances constitute sufficient grounds for ordering the estate to be administered by the Court.

Statement.

ACTION by plaintiff as a judgment creditor of James W. Johnson, deceased, to set aside as fraudulent and constituting an unjust preference certain conveyances of real and personal property made by Johnson to defendant in his lifetime, or to have the same declared a mortgage or lien. Also for the administration in the Supreme Court of the estate of Johnson under his will of which defendant was sole executor.

Judgment was given for the plaintiff.

W. E. Roscoe, K.C., for plaintiff.

H. Mellish, K.C., for defendant.

Ritchie, J.

RITCHIE, J.:—Mr. Mellish, for the defendant, admits that the title acquired by the defendant under the tax deed is held by him in trust for the Johnson estate. This I think was a very proper admission to make as it seems to me to be clear that the defendant would not hold the property conveyed by the tax deed as his own. I find on the evidence and hold that the deeds and bill of sale to the defendant, though absolute in form, are merely securities for the amount which Johnson owed the defendant. The question is whether or not they are invalid under the Assignments Act. I find that Johnson was an insolvent person within the meaning of the Assignments Act, when the

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conveyances were given, and if it were not for the pre-existing agreement hereinafter referred to I would hold that the conveyances were made with the intent to give the defendant an unjust preference over the other creditors of Johnson, and that they had such effect and were given to secure a past due indebtedness. The only thing, therefore, which can save these conveyances from constituting an unjust preference is a pre-existing agreement. Whether there was such an agreement is a question of fact. The defendant says:—

> At the time of the purchase of the hotel by him I supplied a considerable part of the furniture. He was not indebted to me outside of that at that time. After he purchased the hotel I agreed to furnish it for him, which I did. There was no written agreement but he was to secure me. I think I spoke to you about it. Your advice was to take a mortgage of the property in preference to a deed as security for my account. I took a bill of sale of the furniture and a deed of the property.

Again he says:—

> My position in relation to him was that I was going to furnish the hotel and get security. I was to have a deed or a mortgage or whatever I wanted.

This I regard as an absolutely reasonable story. Johnson was, as I understand it, without capital, about to start a precarious business, the success of it being very largely dependent upon whether or not the law against the sale of intoxicating liquor was enforced in Pictou county or not. The value of the hotel depended on that. The defendant was a keen man of business. His conduct in regard to this whole business shews that he was looking after his own interests, and I think it is very unlikely that he would make the advances which he did without an arrangement as to security. It is contended by Mr. Roscoe that the defendant must fail on this point because he is not corroborated. I am fully impressed with the weight of his argument on this point and recognize that when the sole witness is interested and giving evidence as to what took place between himself and a deceased person it is a safe and judicious general rule to require corroboration. But I do not understand that there is any hard and fast rule preventing a Judge or jury from acting upon such evidence though not corroborated.

Here, as I have intimated, I think the inherent probabilities of the case are in favour of the truth of the defendant's evidence on this point. But for such probabilities I would have no hesitation, whatever, in holding that corroboration was necessary. I make this statement in order that the plaintiff may not be prejudiced in the event of appeal by misunderstanding as to the basis upon which I make the finding of fact.

In support of my view that I am at liberty to accept the defendant's evidence on this point without corroboration I quote

from the judgment of Lord Russell in *Rawlinson* v. *Scholes*, 79 L.T. 350, 352, 15 Times L.R. 8.

> The case of *Re Finch* [*In re Finch, Finch* v. *Finch* 23 Ch.D. 267] is inconsistent with the later case of *Re Hodgson* [*In re Hodgson, Beckett* v. *Ramsdale*, 31 Ch.D. 177]. In the former it is said that it is the duty of the Judge to direct the jury not to act upon the unsupported evidence of the claimant in such a case as this. That is not his duty. He should direct them not to act upon it unless it brings conviction to their minds that it is true. The learned Judge in this case seems to have thought that, whether convinced or not that the claim was honest, he was bound to find against it in the absence of corroboration of the evidence of the claimant. This is wrong. He ought to examine that evidence with care, even with suspicion, but if, after that, he felt that it was evidence of truth he should act upon it. He ought to be completely satisfied before allowing the claim, but he ought not to disallow it, satisfied or not, merely because the evidence was not corroborated.

I also refer on this point to *In re Garnett, Gandy* v. *Macaulay*, 31 Ch.D. 1, at p. 9.

The cases cited by Mr. Roscoe are not, I think, at variance with the view which I hold, viz., that the Court ought to regard such uncorroborated evidence with grave suspicion, but is not precluded from accepting the evidence if satisfied that it is true.

The pre-existing agreement strikes me as somewhat vague in its terms but not more so than the agreement in *Webster* v. *Crickmore*, 25 O.A.R. 97, at p. 99; where the agreement was in the following words:—

> Well, of course, we can give you a mortgage on those too (the chattels). If you require it we will give you security on anything that we have.

Osler, J.A., said:—

> I think an honest verbal agreement, even as indefinite as the above, may be available to rebut the intent to prefer, when the instrument is not attacked or the assignment is not made for more than 60 days after it is given.

I find in favour of the pre-existing agreement. It is in writing that the plaintiff advised the making of the deed of the hotel and the bill of sale. There is a defence of estoppel on the record. I referred to this on the argument but Mr. Mellish did not argue it or suggest that such a defence could be supported. I therefore assume that he abandons it and I do not consider it as it is a question which should be argued if it is to be relied on. I decide that the estate of Johnson should be administered in the Supreme Court. I am induced to so decide by the conduct of the defendant as executor. He did not probate the will for a very considerable time. The Legislature has regarded this as a sufficiently grave matter to impose a penalty. He has not caused the estate to be appraised, nor has he filed any inventory, though

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he took an oath that he would do so within three months from the date of probate, and his conduct since the death of Johnson, in setting up that he had an absolute title under the tax deeds and that the other conveyances were intended to be absolute and not as securities, convinces me that he is likely, in the discharge of his duties as executor, to consider his own interests more than the interests of the plaintiff and other creditors.

The plaintiff will have the general costs of the action and the defendant the costs of the issue found in his favour.

Judgment for plaintiff.

ALTA.
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1912
July 2.

LANE v. CRANDELL.

Alberta Supreme Court. Trial before Simmons, J. July 2, 1912.

1. AUTOMOBILES (§ I—2)—LIABILITY OF OWNER—NEGLIGENCE OF PERSON OF OWNER USING SAME FOR HIS OWN PURPOSE—ABSENCE OF AGENCY.

The fact that the owner of an automobile in Alberta has given permission to his brother to use the automobile on his own business without payment raises no presumption of agency between him and his brother, and the owner is not liable to one injured by the gross negligence of his brother while exercising such permission, even though at the time of the accident he be driving home the owner's wife at the owner's request.

[*Veycens* v. *Noakes*, 6 Q.B.D. 530, referred to. See also Pollock on Torts, 7th ed., pp. 77 and 78; and Bigelow on Torts, 8th ed., p. 54.]

Statement

ACTION for damages for personal injury by being run down by an automobile owned by the defendant.

The action was dismissed.

F. E. Eaton, for the plaintiff.

A. H. Clarke, K.C., for the defendant.

Simmons, J.

SIMMONS, J.:—The plaintiff was crossing First street west, just south of Eighth avenue, in the city of Calgary, between 5 and 6 p.m., on the 21st October, 1911, when the defendant's car, driven by Frank A. Crandell, a brother of the defendant, struck the plaintiff, knocking her down and causing bodily injuries to her, as well as tearing her clothes and injuring them. Frank A. Crandell came along Eighth avenue from the west. The corner was congested with traffic. Another car was standing at the south-west intersection of First street west and Eighth avenue, and Crandell waited on account of the congested traffic at the corner.

When Crandell turned out and passed this car and ran down the plaintiff, Crandell's car went about the length of itself after running over the plaintiff, before he succeeded in stopping it.

The evidence discloses gross negligence on the part of Crandell, who was driving the car. One of the plaintiff's witnesses

says that the car was going 15 miles an hour, and another witness said that it was 10 miles an hour. Crandell says that his car was running on low speed and not going more than 4 or 5 miles an hour. If he spoke the truth as to the rate of the car when he ran down the plaintiff, I can only conclude that he was utterly incompetent to be in charge of an automobile on a crowded street, as it is common knowledge that an automobile running at a low speed can be stopped in the space of 2 or 3 feet.

The defendant has raised the question of his freedom from liability, on the ground that, while the defendant was the owner of the car, his brother, who was in charge of the car, was not an agent or servant of the defendant. Frank A. Crandell, who ran down the plaintiff, says that he had the consent of the defendant to use the car in his own business, although he did not pay the defendant for the use of it. On the afternoon of the accident, he was asked by the defendant's daughter to bring home the defendant's wife, and he had taken the defendant's wife into the car, and was bringing her home, when the plaintiff was run over.

Pollock, in his Law of Torts, 7th ed., pp. 77, 78, says:—

> It is quite possible to do work for a man in the popular sense, and even to be his agent for some purposes, without being his servant. The relation of master and servant exists only between persons of whom the one has the order and control of the work done by the other. A master is one who not only prescribes to the workman the end of his work, but directs or at any moment may direct the means also, or, as it has been put, "retains the power of controlling the work."

Bigelow on Torts, 8th ed., p. 54:—

> By the term "servant" appears to be meant one who, being strictly subordinate to and dependent upon the will of his employer within the terms of his employment, does not make, or rather is not engaged to make, contracts for his employer.

Bramwell, L.J., in *Yewens* v. *Noakes*, 6 Q.B.D. 530, 532:—

> A servant is a person subject to the command of his master as to the manner in which he shall do his work.

It is impossible to bring the defendant within the relation of master and servant, as he had no control over the actions of his brother. Nor can the relation of principal and agent be held to apply. An agency may be created in express terms by writing or parol, or it may be presumed from the circumstances and conduct of the parties; and—

> where one has so acted as from his conduct to lead another to believe that he has appointed some one to act as his agent, and knows that that other person is about to act in that behalf, then, unless he interposes, he will in general be estopped from disputing the agency, though in fact no agency really existed: Leake on Contracts, 6th ed., p. 316.

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There is no evidence that the defendant held out to any one that there was any relation of agency between him and his brother; and the fact that his brother had his permission to use the defendant's car does not raise such a presumption.

The plaintiff's action is dismissed, and the defendant will be entitled to costs, if he insist upon them; but, if I may suggest, it seems to me a case where he might forego this right, in view of the circumstances of the case.

Action dismissed.

ONT.

C. A. 1912

PATTISON v. CANADIAN PACIFIC R. CO.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. May 15, 1912.

1. MASTER AND SERVANT (§ II E 5—265)—LIABILITY OF MASTER—"RESPONDEAT SUPERIOR"—QUESTION OF FACT IN EACH CASE.

The application of the rule *respondeat superior* to each particular case depends upon facts and is a question of fact.

[*McCartan* v. *Belfast Harbour Commissioners*, [1911] 2 Ir. R. 141, 44 Irish L.T. 223, referred to.]

2. MASTER AND SERVANT (§ II E 5—265)—LIABILITY OF MASTER—SIGNALMAN APPOINTED BY ONE RAILWAY COMPANY—ANOTHER RAILWAY GRANTED RIGHT TO CROSS LINE—NEGLIGENCE OF SIGNALMAN.

Where a railway company applies to the Railway Board under section 227 of the Railway Act, R.S.C., ch. 37, for leave to cross the line of another railway company, and the Board, by its order giving leave to cross, directs that an interlocking plant shall be established at the crossing at the expense of the applicant company, and that the other company, whenever it desires to make use of the crossing, shall be entitled, upon notice to the applicant company, to place a signalman in charge thereof, whose wages are paid by the company appointing him and reimbursed to it by the applicant company, the signalman so appointed is the servant of the company appointing him, and that company, and not the applicant company, is liable to a servant of the applicant company who is injured by the negligence of the signalman in passing a train of the applicant company over the crossing.

[Judgment of Boyd, C., *Pattison* v. *C.P.R.*, 24 O.L.R. 482, reversed, Garrow, J.A., dissenting.]

Statement

APPEAL by the defendant the Canadian Pacific Railway Company from the judgment of BOYD, C., *Pattison* v. *Canadian Pacific R. Co.*, 24 O.L.R. 482.

The appeal was allowed, GARROW, J.A., dissenting.

Argument

I. F. Hellmuth, K.C., and *Angus MacMurchy*, K.C., for the appellant. Frank Leland, whose negligence was the cause of the accident, was not the servant of the appellant. The evidence shews that Leland was appointed to take charge of the crossing by the Canadian Northern Railway Company, in pursuance of an order of the Board of Railway Commissioners, and that the appellant had no part or voice in his selection, appointment, hiring, or dismissal, exercised no supervision, discretion, or control

over him in the performance of his duties, and was not responsible to him for his wages, nor was he responsible to the appellant for the performance of his duties or subject to the appellant's direction or control: *General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.* (1868-9), L.R. 3 Ex. 330, L.R. 4 Ex. 238; *Grand Trunk R.W. Co.* v. *Huard* (1905), 36 Can. S.C.R. 655, especially at p. 670; *Stewart* v. *Pere Marquette R.W. Co.* (1905), 6 O.W.R. 724; *Donovan* v. *Laing Wharton and Down Construction Syndicate Limited*, [1893] 1 Q.B. 629; *Hansford* v. *Grand Trunk R.W. Co.* (1909), 13 O.W.R. 1184; Fourth Annual Report of the Board of Railway Commissioners, p. 304. The learned trial Judge erred in regarding Leland as a joint or common servant of the two defendants, or as alternately the servant of the one or the other of them according to the service performed and benefit received by each. The rule of *respondeat superior* arises out of the relation of superior and subordinate; and we submit that this relationship did not exist between the signalman and the appellant.

Wallace Nesbitt, K.C., and *Christopher C. Robinson*, for the defendant the Canadian Northern Railway Company. Frank Leland, whose negligence was the cause of the accident, was appointed under and by virtue of the authority contained in an order of the Board of Railway Commissioners for Canada. We submit that this respondent exercised reasonable and proper care in appointing Leland as signalman, as he was a competent person, and his work was satisfactory to the appellant. Under the terms of the order of the Board, this respondent was only the paymaster, inasmuch as the wages of the signalman were reimbursed by the Canadian Pacific Railway Company. At the time of the accident, Leland was engaged in the work of passing a train of the appellant across the diamond, and this respondent was in no way interested in such work, and derived no benefit therefrom, nor was Leland subject to the control of any officer of this respondent. We submit that Leland, while so engaged, was under the sole control and direction of the appellant, and was the servant of the appellant alone. This respondent is, therefore, not liable for the consequences of Leland's negligence. A.'s servant may become B.'s on a particular occasion and for a particular purpose, notwithstanding that he continues in A.'s service and is paid by him: *Union Steamship Co. Limited* v. *Claridge*, [1894] A.C. 185, at p. 188. It is the company for which the act is being performed at the time that is responsible, where the servant has been compulsorily appointed. We refer to the following authorities: *Warburton* v. *Great Western R.W. Co.* (1866), L.R. 2 Ex. 30; *Swainson* v. *North Eastern R.W. Co.* (1878), 3 Ex. D. 341; *Hansford* v. *Grand Trunk R.W. Co.*, 13 O.W.R. 1184; *Hall* v. *Lees*, [1904] 2 K.B. 602.

C. A. Moss, for the plaintiff, asked, in the event of the appeal being allowed, for leave to appeal as against the Canadian Northern Railway Company, and for judgment against that company.

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Hellmuth, in reply, referred to *Dewar* v. *Tasker and Sons Limited* (1907), 23 Times L.R. 259; *The Sussex*, [1904] P. 236, at p. 251; *The Halley* (1868), L.R. 2 P.C. 193; *Jones* v. *Scullard*, [1898] 2 Q.B. 565, at p. 573.

May 15, 1912. MOSS, C.J.O.:—This appeal, though nominally and in form an appeal against the plaintiff, is in substance and reality an appeal against the defendant the Canadian Northern Railway Company. At the trial, and again on the argument of the appeal, it was admitted that the unfortunate accident which caused the death of the plaintiff's husband was due to the gross negligence of one Frank Leland, who was operating the points and signals in connection with the interlocking plant at Ward's crossing.

The amount of damages to be paid by the company ultimately held liable was agreed upon and fixed at $4,250.

The only question tried and debated was, which one of the defendants was answerable for the consequences of Leland's negligent act?

The solution of that question is to be found by ascertaining from the facts established in evidence whose servant Leland was, in fact and law, when he committed the negligent act. And, as has been many times observed, the answer depends upon the facts and the proper inferences to be drawn from them. The recent case in the House of Lords of *McCartan* v. *Belfast Harbour Commissioners* [1911], 2 Ir. R. 143, 44 Irish L. T. 223, was one in which action was brought for personal injuries to the plaintiff while engaged in helping to unload a ship. A crane, the property of the defendants, was hired to the master of the ship for unloading purposes. The crane was in charge of and worked by a servant employed by the defendants. The plaintiff was working under employment by the master of the ship, and was injured through the negligence of the craneman. There was judgment for the plaintiff, and ultimately an appeal to the House of Lords. It was contended for the defendants that *quoad* the work on which he was engaged at the time of the accident the craneman was the servant of the master of the ship, and not the defendants' servant. The Lord Chancellor said: "I regard this case as one purely of fact, in which no point of law is in dispute. The question on which the decision hinges is this—Was the man, whose negligence caused this accident, acting as servant of the defendants in doing what led to the mishap, or as servant to the master of the vessel which was being unloaded?" And Lord Dunedin said (p. 226): "There is no principle involved in . . . this case except the principle which I have already mentioned, which is compendiously described by the brocard *respondeat superior*, and as to which no one entertains any doubt. The application of that principle to each particular case depends upon facts, and is a question of fact . . ."

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The present case having been tried without a jury, and there being no substantial difference as to the facts, we are free of the difficulties which sometimes arise in dealing with findings upon disputed facts. It only remains to endeavour to make the proper application of the facts and the inferences to be drawn from them, in order to ascertain which of the two companies is liable.

The learned Chancellor has held the defendant the Canadian Pacific Railway Company liable, basing his conclusion, as I read his opinion, upon three grounds: (a) that, Leland being the common signalman, the proper legal outcome as to liability in case of negligence is, that he was to be regarded as the person employed by the company for which he was adjusting the points and giving the signals; (b) if the order of the Board of Railway Commissioners, coupled with its directions, be regarded as a *quasi* contract or in the nature of a contract between the companies, the rules of common law would place liability on the company which was making use on its own line of the common servant for the sole prosecution of its sole work at the crossing; (c) or if, rejecting the theory of joint service, and regarding Leland, appointed and paid in the manner in which he was, as the servant or agent *sui generis* of both companies, then fairness and good sense would support the proposition that the company for whom he was alone acting on the particular occasion was the principal against whom relief should be sought in case of misconduct on Leland's part occasioning injury to an employee of the last-mentioned company.

But, however strongly these propositions may appear to be consistent with what should be fair as between the two companies, I am, with deference, unable to think that they can be considered as decisive of the question in issue here. In order to give effect to them, it must be first found that Leland was the common servant of the companies. He was, it is true, the common signalman, in the sense that he was the only one in charge; but it by no means follows that he was the servant of both companies. It must depend upon the circumstances of his engagement, the nature of the duties he owed to the respective companies, and the extent of the control over his conduct and actions vested in each of them.

The occasion for the employment of a person performing the duties which Leland was engaged in, arose out of the application of the Canadian Pacific Railway Company to the Board of Railway Commissioners for leave to cross the track of the Canadian Northern Railway Company's spur line to their gravel pit at the point in question. The Board granted the leave, but directed that the Canadian Pacific Railway Company should, at its own expense, under the supervision of an engineer of the Canadian Northern Railway Company, insert a diamond in the track of the latter company at the point of crossing, and that the crossing be protected by an interlocking plant, derails to be placed on the lines of

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both companies on both sides of the crossing, the derails to be interlocked with home and distant signals. Then followed directions bearing directly on the question here, viz.: (4) that, during such period of the year as the line of the Canadian Northern is not being operated, the signals and derails be set and placed so as to permit the crossing to be safely made by trains of the Canadian Pacific, without stopping, and that, during such period, it shall not be necessary to have a man in charge of such crossing; (5) that the Canadian Northern Railway Company be entitled to place a man in charge of such crossing whenever the said line is to be operated by that company, upon giving to the Canadian Pacific Railway Company at least 48 hours' previous notice in writing of its intention so to do.

Thus far it will be seen that, so long as the Canadian Northern Railway Company is not operating its line, no necessity for having a man in charge of the crossing exists, and it is only when the Canadian Northern Railway Company desires to operate its line that a man is to be placed in charge. Until the arrival of that time, the Canadian Pacific was free to use its line for all proper and legal purposes without hindrance at the crossing. The next material directions are: (7) that the man in charge of the interlocking plant be appointed by the Canadian Northern; and (8) that the Canadian Pacific bear and pay the whole cost of providing, maintaining, and operating the interlocking plant, including the cost of keeping a man in charge of the crossing. With these should be read the stipulations of clause (6) that, in the movement of trains of the same or of a superior class over the crossing, the trains of the Canadian Northern have priority.

So that, when the occasion for placing a man in charge arises, his appointment is to be made by the Canadian Northern, and he is to be paid in the first instance by it. The Canadian Pacific is to indemnify the Canadian Northern for the cost of keeping him in charge, but otherwise there is nothing expressed which would give the Canadian Pacific any control over or power of interference with him in the performance of his duties. Complete control of the interlocking plant and of the man in charge is left to the Canadian Northern, and in the movement of trains its are to have priority. The evidence shews that the two companies so interpreted the effect of the order. The man in charge was invariably appointed by the Canadian Northern without any previous communication with the Canadian Pacific; and it nowhere appears that it ever interfered with the man in the performance of his duties. It was, of course, open to the Canadian Pacific to complain to the Canadian Northern in case of neglect or failure of the man to attend to his duties; but it had no power to dismiss or even suspend him. It was, of course, part of his duty to pay attention to the signals from trains of the Canadian Pacific approaching the crossing, and to set and place the signals and derails so as

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to permit the crossing to be safely made as soon as the traffic on the Canadian Northern Railway Company's line permitted. But such acts as these cannot be so classed as to convert them into orders or directions given to him as a servant of the Canadian Pacific Railway Company. As the case appears to me, it is the simple case of a man employed and paid by the Canadian Northern Railway Company, subject only to its orders and subject only to dismissal by it, acting on its behalf as the company having sole control of the interlocking plant, but under obligation to permit the crossing to be safely made by the Canadian Pacific Railway Company's trains, though in subordination to the Canadian Northern Railway Company's trains.

And, in my opinion, no question of joint or common employment or agency arises. Leland was at the time engaged in permitting a Canadian Pacific train to make the crossing in response to its signal, and his negligent act was in displacing the points after he had permitted the train to proceed.

I think that negligent act was committed by Leland as the servant of the Canadian Northern Railway Company, and that it should be held liable for the damages.

This conclusion gives rise to another question, which was raised and partially discussed upon the argument of the appeal. The plaintiff has not appealed against the Canadian Northern Railway Company, nor asked that, if the judgment against the Canadian Pacific Railway Company be set aside, judgment for the damages should be entered against the Canadian Northern Railway Company. Upon the argument of the appeal, counsel for the plaintiff asked to be allowed to appeal so as to obtain judgment against the Canadian Northern Railway Company.

The case seems a proper one for giving this relief, and it should be granted. But the Canadian Northern Railway Company may be advised that, in order to render unnecessary any further argument, it would be proper to submit to judgment in the same way as if an appeal had been brought by the plaintiff in the first instance.

In that case, judgment may go setting aside the judgment against the Canadian Pacific Railway Company, and directing judgment to be entered against the Canadian Northern Railway Company, with costs throughout to the plaintiff and the Canadian Pacific Railway Company.

If, however, it is deemed necessary by any of the parties, the matter may be mentioned again.

MOSS, C.J.O.

MACLAREN, J.A., concurred.

MACLAREN, J.A.

MEREDITH, J.A.:—I am quite unable to agree with the trial Judge in his views of this case.

MEREDITH, J.A.

I am quite unable to understand how any one who does not hire or pay, and who cannot discharge, order, or control, a servant

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employed and paid and subject to discharge by, and to the orders and control of, another person only, can be considered the master of or answerable for the misconduct of such a servant: manifestly, I would have thought, the master could be only he who employed, paid, and discharged the servant, and to whose orders and control solely he was subject.

In this case the Canadian Northern Railway Company hired, paid, and discharged all the signalmen of the crossing where the accident happened, who were all subject to the orders and control of that company solely. The Canadian Pacific Railway Company had no voice in any of these things, they had no power whatever over any of them, nor ever assumed or attempted to exercise any authority respecting them: their only right was that of any other stranger to the contract between master and servant, to complain to the master if they had fault to find with any act of the servant; but even that was never done.

How then is it possible, rightly, to hold the Canadian Pacific Railway Company liable for his negligence in the performance of his duties in such a service? Because that company was bound to recoup the other in the amount expended in his wages, cannot have any such effect: see *The Slingsby* (1903), 120 Fed. Repr. 748, and *Swainson* v. *North Eastern R.W. Co.*, 3 Ex.D. 341.

The narrow ground upon which the trial Judge held that the Canadian Pacific Railway Company is liable, was, in my opinion, based upon error in fact as well as in law. It is not a fact that, in doing that which caused the accident, the signalman was acting upon the request, or at the instance, or for the benefit, of that company. When their train was approaching the crossing, the signals of safety were set upon the line which gave them a clear right of way: there was no need for, or to signal for, any service on the part of the signalman; it was the right and the duty of the train to go on as it did; the difficulty arose not from any service needed or asked for by those in charge of the train, but by reason of the other company's tipsy servant interfering with that train's right of way, not at the request or instance of the Canadian Pacific Railway Company or for their benefit, but wholly and diametrically opposed to their interests and desires. On the contrary, it was for the benefit of the other company, because his actions made its line safe, in making the Canadian Pacific Railway Company's line unsafe, and throwing the train off the track and killing the plaintiff's husband. It ought not to be necessary, but it seems to be, to say that in making the one line safe the other is necessarily made unsafe; that is the purpose of the interlocking apparatus: in opening the "derailing" switch on the one line, that switch is automatically closed on the other line, giving the only safe right of way to the latter.

One might well differ from the trial Judge with greater hesitancy, were it not that he was under a misapprehension of some of

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the very material facts of the case when disposing of it; the Canadian Northern Railway Company was not ordered by the Railway Board "to appoint a competent man" to be in charge of the crossing; the order was, that they "be entitled to place a man in charge of such crossing," when the line was to be put in use by them, upon giving forty-eight hours' previous notice to the other company. The Canadian Northern Railway Company did not use at all times this part of its road; and so it was at liberty to withdraw the signalman whenever it saw fit not to use it; at which times, if it did its duty, it would see that this interlocking switch was securely locked so as to give the right of way all the time to the other company's line; and so the signal service was all the more under its control and in its charge and keeping.

It was also incorrect to say, as the trial Judge did, in his reasons for deciding against the Canadian Pacific Railway Company, that a competent man was appointed to the satisfaction of that company; that company was in no way consulted about the appointment of any of the several signalmen, and knew nothing about them, nor had anything to do with them, but had to, and did, submit to all such appointments as the other company chose to make.

So, too, to say that the signalman was in the service of the Canadian Pacific Railway Company, which paid him and concurred in his appointment; and that the service at the time and place in question was being performed solely on behalf of and for the benefit of that company. If these things had been as they are incorrectly stated, a very different case would be presented for consideration on this appeal.

Judging only from the quotation from them made by the trial Judge, it seems to me to be obvious that the views expressed by the Chairman of the Railway Board, upon the application which was then before him, which had nothing to do with this matter, have been misapplied to this case. The Chairman was evidently dealing with the question of what should be the form and effect of the order to be made upon an application for crossing facilities; not in any sense as to the effect of the order which had been made in this matter; if it had been otherwise, I cannot think that any one could agree with him; as they are even, there may be very different opinions.

It would certainly be a new and unfortunate state of affairs if one were to be held answerable in damages for the misconduct of a servant in whose appointment he had no voice, and who was not subject to his orders or control, nor hired or paid by him, and who was not acting upon his request or at his instance or for his benefit, but the very opposite, in the misconduct which caused the injury; a man to whose directions, at the crossing, they were bound to conform: not he to theirs.

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The case seems to me to be a very plain one of liability of the Canadian Northern Railway Company at common law; and not of liability of the Canadian Pacific Railway Company under the Workmen's Compensation for Injuries enactments, or otherwise.

Since this opinion was written, I have had an opportunity of perusing the ruling of the Railway Commissioners referred to in it, and find that it is entirely in accord with the views I have expressed in all respects. It is there said by the Chief Commissioner, among other things: "I think, in all cases where the Board has made crossing orders, the man in charge of the interlocker has been regarded as the employee of the senior"—the Canadian Northern Railway—"company only, in which event, if, through his carelessness or negligence, damages arise to the servants or employees of the junior company, recovery must be had against the junior company."

Magee, J.A.

MAGEE, J.A.:—The Railway Act, R.S.C. 1906, ch. 37, in sec. 151, clause (*c*), gives each company the power to cross any railway, as by clause (*d*) it gives power to carry the railway across the lands of any person; but, by sec. 227, it directs that the cars shall not so cross another railway until leave therefor has been obtained from the Board of Railway Commissioners; and, upon application for such leave, the Board may direct that such works and appliances be installed, maintained, and operated, watchmen or other persons employed, and measures taken, as appear to the Board best adapted to prevent danger, and may make other directions; and, by sec. 229, at any such crossing at rail level the Board may order the adoption of such interlocking switch, derailing device, signal system, and appliances, as to render it safe for trains to pass over the crossing without being brought to a stop.

In 1908 the Canadian Pacific Railway Company, which I may call "the Pacific," desired to cross this spur-line of the Canadian Northern Railway Company, which may be called "the Northern," and it did not desire to do so overhead or by a subway, but at rail level; and it made application to the Board to vary a previous order of the 26th December, 1906, by granting permission to use the crossing for other than construction purposes and by having the crossing protected by home and distant signals. The Board's order of the 29th April, 1908, gave: (1) the leave to cross; but directed (2) that the Pacific company, at its own expense, under supervision of an engineer of the Northern company, should insert the diamond at the crossing; (3) that it should be protected by an interlocking plant, derails to be placed on the lines of both companies on both sides and to be interlocked with home and distant signals; (4) that, during such period of the year as the Northern line is not being operated, the signals and derails be set so as to permit the Pacific trains to cross without stopping, and then it should not be necessary to have a man in charge of the

crossing: (5) that the Northern company "be entitled to place a man in charge" of such crossing whenever the line is to be operated by that company, upon giving notice to the Pacific company; (6) that the Northern company's trains have priority; (7) that the man in charge be appointed by the Northern company; and (8) that the Pacific company bear and pay the whole cost of providing, maintaining, and operating the interlocking plant, including the cost of keeping a man in charge of the crossing. By another order, of the 7th May, 1908, on the Pacific company's application, and on the recommendation of the Board's engineer, "the applicant company and the railway company," which I suppose means both companies, were authorised to operate trains over the crossing without being brought to a stop.

Among the rules adopted by the Board for interlocking systems at crossing at rail level, one provides that "when the signals on the distant and home posts indicate safety, the train can proceed."

In September, 1910, the crossing was in operation, and the Northern company was using the spur-line for hauling gravel and other purposes, but the Pacific company had five or six times as many trains crossing as the Northern company. A signalman was in charge, and operated the signals and derails on both lines from a tower, which seems to have been located on the land forming the original right of way of the Northern company, though that is not very clear. No part of that land seems to have been acquired by the Pacific company.

The Pacific company's train, on which the plaintiff's husband was fireman, was proceeding to cross without stopping, as the signals indicated safety, and the signalman in the tower, negligently and without cause or warning, operated the derailing switch on the Pacific company's property and derailed the train, and the fireman was killed.

The negligent signalman had been selected and appointed solely by the Northern company, and was subject only to its control and to dismissal by it. He made reports periodically to that company, and only to it. The Pacific company was not consulted or entitled to be consulted as to his appointment or retention, and had had no voice therein. It could not discharge or even suspend him, and at the most could only complain of any misconduct by him to his employer, the Northern company—but, no doubt, had an ultimate right of complaint against that company itself to the Railway Commissioners. His wages were agreed upon between him and the Northern company and paid by that company without consultation with the Pacific company, but were reimbursed by the latter company to the Northern. He was furnished by the Northern company with its rules for crossings. He also had a copy of those of the Pacific company, but it does not appear how he obtained them. The rules of both companies are, in effect, if not literally, the same, both being approved by

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the Board. It was necessary for him to have time-tables of both companies, and they were furnished to him. The Northern company's superintendent says that that company "gave instructions to him in connection with the operation." It does not appear that the Pacific company gave any instructions. It is stated that generally the senior company—the company whose line is subsequently crossed by another—has the privilege of appointing the signalman at crossings.

As the signalman was not required when the Northern company was not operating that line, nor before the crossing was made, it cannot be said that he was employed for the service of either company as regards danger from its own trains, appliances, or employees. He was authorised to use appliances and perform operations therewith on the Pacific company's property, but any danger he was there to prevent would be a common danger to both companies, and, therefore, never a danger of the Pacific company, apart from danger to the Northern company, his employer. In setting the signals and rails properly for "safety" on the Pacific line, he was doing no more than saying that his employer's trains or track were not going to interfere with the train. In wrongfully moving the derailing appliance, he was saying, "There is danger to my employer's property as well as to you." What actuated him to do as he did does not appear, but it is not at all likely, and it certainly is not proved, that he was seeking to save the Pacific train alone from danger on the Pacific line. What happened was much the same as if the railway watchman at a highway crossing were to signal to a teamster that it would be safe to cross, and then drop the bar across the horse's back.

It is true that the train was derailed by means of an appliance put on the Pacific track by the Pacific company, and which that company assented to being used by the Northern company, through its signalman; but they did not assent to his doing so negligently or improperly, and there was no negligence in giving such assent.

It is not the fact that the engineer or any employee of the Pacific company signalled for any movement of the signals or switches, either then or ordinarily. The signalman of the Northern company controlled the right of the Pacific company's trains to cross, but no employee of the Pacific company had any authority over the signalman.

It is true that the Pacific company had applied for the protection of the crossing by signals, and the signals would necessitate a signalman; but they did not ask for or obtain the control in any way of the signalman. As appears, it is usual for the "senior" company at railway crossings to appoint the signalman. In fact the Pacific company did no more than a municipality might do which asked that a railway company should maintain a watchman at a highway crossing.

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From the decision of the Board of Railway Commissioners (report for 1909, 44 Sessional Papers, 1910, 20 c., p. 304), mentioned by the learned Chancellor, it is apparent that it was the view of the Board, and it would seem of the railway companies themselves, that, in taking the appointment of the signalman, the senior company was assuming a serious responsibility, which it was felt they should not in future orders be subjected to, and the Board decided that in future orders, made after the 1st October, 1909, it would be provided that the signalman should be regarded as an employee of both senior and junior companies.

Meredith, J.A.

Apart from that view, upon the facts here it does not appear that the negligent signalman was in fact, in any sense, in the service of the Pacific company, or that, at the moment of his negligent action or in taking the course he did, he was for the time being acting otherwise than as the servant of the Northern company, which, through him, was unwarrantably placing an obstruction upon the Pacific company's property in the way of the train.

This appeal of the Pacific company should, in my opinion, be allowed, and the plaintiff should have leave to appeal against the judgment in favour of the Northern company; and I agree in the proposed disposition of the costs.

Garrow, J.A.

GARROW, J.A. (dissenting):—The plaintiff sues on behalf of herself and the infant children of her late husband, Samson Pattison, to recover damages resulting from his death on the 10th September, 1910, through the alleged negligence of the defendants or of one of them.

The amount of the damages was agreed upon at the trial at the sum of $4,250.

The deceased, Samson Pattison, was in the employment of the defendant the Canadian Pacific Railway Company, as a locomotive fireman. On the occasion in question, he was employed upon an engine attached to a train proceeding from the city of Winnipeg easterly. About seven miles east of Winnipeg, at a place called Wood Crossing, the line of railway of the defendant the Canadian Pacific Railway Company crosses the line of the defendant the Canadian Northern Railway Company, and what there occurred is thus expressed in the statement of claim and admitted in the statement of defence of the defendant the Canadian Pacific Railway Company:—

"5. Upon approaching the said crossing, the train upon which the said Pattison was working was given the through signal from the distance signal, and, in pursuance of such signal so given, was proceeding along the track, and, when nearing the home signal, the signal was suddenly, through the negligence of the man in charge of the same, reversed, and the derail switch thrown open, thus causing the train to be derailed, which resulted in Pattison's death."

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The man in charge of the signals at the crossing was one Leland, who was afterwards prosecuted for manslaughter and convicted. And the sole question in the case is, which of the two defendants should be held responsible for Leland's negligence.

The facts as to Leland's appointment are as follows. The defendant the Canadian Northern Railway Company had what is called a spur line of railway leading to certain gravel pits, used only to reach them. The defendant the Canadian Pacific Railway Company desired to cross this line, and made application for that purpose to the Board of Railway Commissioners for Canada for an order permitting such crossing to be made. And an order dated the 29th April, 1909, was accordingly made. By the terms of the order, it was provided, among other things, that the defendant the Canadian Northern Railway Company should appoint and place a man in charge of the crossing, and that the defendant the Canadian Pacific Railway Company should bear and pay the whole cost of providing, maintaining, and operating the interlocking plant which the order directed should be established at the crossing, including the cost of keeping the man in charge at the crossing.

In pursuance of the order, the interlocking apparatus was put in, and the crossing duly established.

The defendant the Canadian Northern Railway Company appointed Leland and placed him in charge at the crossing on the 30th April, 1909; and he remained in charge until the accident on the 10th September, 1910. He was paid his wages in the first instance by the defendant the Canadian Northern Railway Company, but that company was fully recouped in respect of such wages by the defendant the Canadian Pacific Railway Company.

The learned Chancellor held that the defendant the Canadian Pacific Railway Company alone was liable, under the circumstances, for the damages agreed upon, with costs of action; and with that conclusion I agree.

Such cases are always, in my experience, somewhat difficult of easy solution, largely, I suppose, owing to the somewhat nice distinctions and discriminations which must be made. The law itself seems plain and simple enough. It is the facts and the inferences of fact which are troublesome.

The principle of *respondeat superior*, upon which they all rest, is thus expounded by Best, C.J., in *Hall* v. *Smith* (1824), 2 Bing. 156, at p. 160: "The maxim of *respondeat superior* is bottomed on this principle, that he who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it." And that a person may, while the general servant of one person, become the particular servant as to a particular act of another person, in other words, serve two masters, cannot now be disputed, in the light of the authorities.

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In *Union Steamship Co.* v. *Claridge*, [1894] A.C. 185, at p. 188, Lord Watson said: "That the servant of A. may, on a particular occasion, and for a particular purpose, become the servant of B., notwithstanding that he continues in A.'s service and is paid by him, is a rule recognised by a series of decisions;" to some of which I referred in *Hansford* v. *Grand Trunk R.W. Co.*, 13 O.W.R. 1184, cited by the Chancellor in his judgment.

In a recent case in the House of Lords, *McCartan* v. *Belfast Harbour Commissioners*, reported in 44 Irish Law Times 223, also in [1911] 2 I.R. 143, in speaking of the value of such cases, the Lord Chancellor said (p. 145 of the latter report): "Decisions are valuable for the purpose of ascertaining a rule of law. No doubt they are also useful as enabling us to see how eminent Judges regard facts and deal with them . . . But it is an endless and unprofitable task to compare the details of one case with the details of another, in order to establish that the conclusion from the evidence in the one must be adopted in the other also."

That case involved a similar question, namely, which of two alleged masters was liable for the negligence of the servant of one of them to another servant engaged in the same operation. The case had been tried by a jury, and the question is referred to by more than one of the learned Judges in the House of Lords as a pure question of fact involving no legal principle.

I am afraid I must plead guilty to having spent some time in the "unprofitable task" of seeking comfort and assurance from the judgments of other learned Judges in other cases of a somewhat similar nature, with the result that I am obliged to say, after looking at a great many of them, that in no case do I find the material facts to be of such a peculiar nature as in this case. In all of them there was what there is not here, namely, a voluntary hiring, in the ordinary sense, of the negligent servant by at least one of the alleged masters, and, therefore, no difficulty in determining whose general servant he was—the difficulty occurring later on when his services had been lent or bargained for temporarily to another. And the test usually applied was, who had the power to direct or control him in the doing of the act out of which the negligence arose. See *Waldock* v. *Winfield*, [1901] 2 K.B. 596; *Donovan* v. *Laing Wharton and Down Construction Syndicate Limited*, [1893] 1 Q.B. 629; *Brady* v. *Chicago and Great Western R.W. Co.* (1902), 114 Fed. Repr. 100; *Brow* v. *Boston and Albany R.R. Co.* (1892), 157 Mass. 399.

The initial difficulty here is, to say that Leland was ever at any time, in any proper sense, the exclusive servant of the defendant the Canadian Northern Railway Company. That company, it is true, appointed him, but only under the compulsion of a statutory order. And it is also true that that company, in the first instance, paid his wages; but, in the end, they were really paid by the other company, at whose instance, and to serve whose

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purposes, the appointment was made. That company, it may fairly be said upon the facts, in the language of the definition of Best, C.J., was the company which expected to derive, and did derive, the chief advantage from his acts. He, in fact, did nothing for the other company but what had been rendered necessary by acceding to the request of the first-mentioned company. For months at a time, the little spur-line of the defendant the Canadian Northern Railway Company was entirely closed, at which time, by the terms of the order, the signals and derails were so set as to admit of the trains of the other company passing without stopping, and the services of a signalman then wholly dispensed with.

Having regard to all the circumstances, I see no difficulty in construing the order under which Leland was appointed as providing, and intended to provide, for the case of a signalman who should be in charge of the crossing and should be in the service of the two companies, acting for each upon its own lines as the occasion required; and in holding that, on the occasion in question, Leland, the signalman in charge, was a person in the service of the defendant the Canadian Pacific Railway Company as employer, who had charge or control of the points and signals at the crossing in question, within the meaning of sec. 3, sub-sec. 5, of the Workmen's Compensation for Injuries Act.

Such a construction violates no rule of law, in my opinion, and is in entire accordance with the justice of the case.

I would dismiss the appeal with costs.

Appeal allowed; GARROW, J.A., *dissenting.*

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New Brunswick Supreme Court, Barker, C.J., Landry, McLeod, White and McKeown, JJ. April 19, 1912.

1. EVIDENCE (§ VI C—525)—COLLATERAL PAROL AGREEMENT—EXPLAINING AND MAKING CLEAR DOUBTFUL AND UNCERTAIN TERMS.

In an action to recover an amount claimed to be due on a written contract for cutting and hauling logs for a paper manufacturing company which contained the following clauses: (1) the plaintiff "agrees to haul none but good, sound, merchantable logs"; (2) all logs hauled by him "to be scaled by——or some other competent person to be appointed" by the company, "whose scale shall be final between the parties to this instrument"; and (3) "logs to be scaled by scaler to what in his judgment will make good merchantable lumber," parol evidence is admissible to shew that the parties entered into a collateral verbal agreement that the logs were to be scaled on the same scale as had been used by the company's scalers in scaling logs hauled for it by the plaintiff under similar written contracts during the two preceding seasons and that the parties entered into the written contract on the faith of the verbal agreement, where it appeared that the company's scalers did not use the method of scaling of the preceding seasons, but used, at the direction of the company, another method which materially reduced the plaintiff's remuneration, upon the ground

that such evidence explained and made clear the aforesaid clauses therein which were so doubtful and uncertain in their meaning that without it the actual intention of the parties might and probably would be defeated, such evidence in no way altering the written contract.

2. EVIDENCE (§ XII J—969a)—WEIGHT ATTACHED TO WRITTEN AND PRINTED TERMS IN A CONTRACT.

A written clause of a contract is entitled to have greater effect attributed to it than a clause in a printed portion of the agreement pertaining to the same subject.

[*Glynn* v. *Margetson*, [1893] A.C. 351, specially referred to.]

3. EVIDENCE (§ VI E—535)—PAROL EVIDENCE TO EXPLAIN AN AMBIGUITY—INTENTION OF PARTIES.

Oral evidence is admissible to make plain an ambiguous and uncertain provision of a written agreement in order to put the Court and jury in possession of facts which throw light upon the intention of the parties which was obscured by their doubtful language in expressing it.

[*Shore* v. *Wilson*, 9 Cl. & F. 355; *Bourne* v. *Gatliff*, 11 Cl. & F. 45; *Fitzgerald* v. *Grand Trunk R. Co.*, 28 U.C.C.P. 586, affirmed on appeal *sub nom. Grand Trunk R. Co.* v. *Fitzgerald*, 5 Can. S.C.R. 204; *McAdie* v. *Sills*, 24 U.C.C.P. 606; and *Harris* v. *Moore*, 10 O.A.R. 10, specially referred to.]

Statement

APPEAL by defendants from the judgment of Barry, J., at the trial in favour of the plaintiff.

The action was brought to recover an amount claimed to be due the plaintiff under a written contract made by him with the defendants, for cutting and hauling a quantity of logs. The contract was dated June 9th, 1908, and was signed on behalf of the defendants by their agent, A. M. Munee, who had charge of this branch of the company's business and negotiated the terms of the contract with the plaintiff. The logs were to be cut on ground in New Brunswick owned by the defendants and delivered on the ice to Lacoot lake. The contract was for four millions to be delivered the first year, and not less than three millions each succeeding year until the land was cleared. The plaintiff was to receive for spruce and fir logs, at the rate of $8 per thousand feet, and $7 for hemlock.

The appeal was dismissed.

M. G. Teed, K.C., and *N. Mark Mills*, for plaintiff.

The Attorney-General, and *J. B. M. Baxter*, K.C., for defendants.

The judgment of the Court was delivered by

Barker, C.J.

BARKER, C.J.:—Though not so stated in the contract, it is an undisputed fact that these logs were for the manufacture of pulp at the defendants' mill, which is situate on the State of Maine side of the St. Croix river. In making this contract there was used an old printed form in use by Messrs. Todd (who formerly had charge of the lumbering operations of the defendant company), for contracts for saw-logs. A part is printed, and the remainder is typewritten. In the printed part are the fol-

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lowing clauses: "He" (*i.e.*, the plaintiff) "agrees to haul none but good, sound, merchantable logs," and "all logs hauled by said Mann to be scaled by —— or some other competent person, to be appointed by said St. Croix Paper Co., whose scale shall be final between the parties to this instrument—one half the expense of scaling to be paid by each party." In the type-written part of the contract is the following provision: "Logs to be scaled by scaler equal to what in his judgment will make good merchantable lumber." Munce was appointed manager for the company in January, 1908. Prior to that time Mr. Henry Todd had acted in that capacity in the making of these log contracts, and the plaintiff had a contract for the 1906, and another for 1907, made by Todd in form precisely like this 1908 one, and containing precisely the same provisions as to scaling as those I have given from that contract.

The evidence shews that while he was manager, Mr. Todd, acting for the company, made a general rule as to scaling the logs got out under these contracts. The company made a scale of its own, which it adopted in estimating the contents of logs got out, as these were, for pulp. It became known and was spoken of by the witnesses as the Todd pulpwood scale, and was a modification of what is known as the Bangor scale for saw-logs. Duston, a witness produced by the plaintiff, was in the defendants' employ as book-keeper, and in that way became conversant with all these matters. His evidence on this point is as follows:—

> Q. Did you understand from your dealings in the matter under Mr. Todd, that there was any general plan for scaling? A. Yes, there was. Q. That the company acted on? A. Yes. Q. And generally, did this apply to the contractors for getting out the lumber? A. Yes. Q. Tell us what that plan or scheme was? A. They were to use the Bangor scale . . . Q. Then what was the rule or practice that governed the operations, during the two previous years, of the plaintiff and defendants with respect to the getting out of lumber? A. The two previous years? Q. Yes. A. I don't understand. Q. The two years previous to entering into the present contract; 1906-7, 1907-8? A. The arrangement as to scale: We called the Bangor scale the basis, and we were to measure the top end on 24 feet logs, and up to 36 they were to allow one inch raise, and from 36 up they were to allow 2 inches raise and more if the shape of the log warranted. Q. That would be in the judgment of the surveyor? A. Yes, according to the surveyor's judgment.

The witness goes on to describe the manner of scaling minutely, and said that this scale was adopted in the case of the logs cut in the seasons of 1906-7 and 1907-8, by the plaintiff for the company. He also says that this rule was made by Mr. Todd after consultation with the log haulers who agreed to it, and it was a general rule adopted by the company. The important point in this rule is the allowance of the one inch raise

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in logs over 24 feet long. The object of it was to alter the saw-log scale so as to give the full contents of the log when scaling for pulp-wood, because it was all used up, whereas in scaling for saw-logs only a portion of them could be manufactured into merchantable lumber, and the balance was refuse and sold accordingly. Duston explains it thus: "I would not say whether Mr. Todd had made any calculations with the idea of that one-inch raise. Of course, the Bangor scale is a saw-log scale, and the idea of that one-inch raise was that these logs were to be used for pulp. The one-inch raise was to add to the size of the log for what was allowed for slabs, and the pulp log would be used for pulp."

The jury found the following facts:—

(1) That the logs contracted for were intended by the defendants to be used for making pulp.

(2) That at the time the terms of the written contract were agreed upon there was a collateral verbal contract or agreement between the parties, that the logs should be scaled on the same scale that had been used by the defendants' scalers in scaling logs hauled by the plaintiff for the defendants under similar written contracts during the two preceding seasons, and that the parties entered into the written contract on the faith of the verbal agreement.

(3) That the scale used those two preceding seasons was not the Bangor saw-log scale, but what was known there as the Todd pulpwood scale, as described by the witness Jesse F. Duston, in giving his evidence.

(4) That the defendants' scalers on the logs got out under the contract in the season of 1908-9 and 1909-10, did not use the so-called Todd pulpwood scale; and that in order to make the quantities returned by the scalers equal to what they would be under the Todd pulpwood scale an addition of 25 per cent. should be added. This addition would amount to 709,456 superficial feet for the first season, and 854,591 superficial feet for the other season.

(5) That the scalers did not scale the logs equal to what in their judgment would make good merchantable lumber.

(6) That Munce, the defendants' agent who made the contract, knew when he did so what the Todd pulpwood scale was.

(7) That the scalers did not follow the method provided by the oral agreement in consequence of instructions from the defendants.

(8) The scalers applied the Bangor scale to the plaintiff's logs.

The Bangor scale, which is a saw-log scale, Munce describes thus:—

> The method of applying the Bangor rule, and the only method I knew or ever heard of was to scale the lumber up to 27 feet without raise, applying the rule to the top inside of the bark, and to take the figures given on the rule. Anything 28 feet and up the scaler was supposed to give a raise to the best of his judgment. 36 to 42 or 44 to give 2 inch raise. Not definite that he should give it, but as a custom.

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And in Munee's instructions to his scalers—to which I shall have occasion to refer later on—he directed them not to allow taper on logs until they reached 28 feet.

As a practical result of the scaling as actually made and what it would have been under the Todd scale, there is a difference for the two seasons of something over one and one-half million feet in favour of the plaintiff, amounting at the contract-price to $12,512.36, which, with the interest added is $13,521.09, the amount for which the verdict was entered.

I understand that except as to some matter of interest the correctness of these figures is not disputed, provided the plaintiff is able to maintain his contention that the contents of the logs are to be determined under the Todd pulpwood scale. I see no reason for disturbing the findings of the jury as I have outlined them.

There is ample evidence to support these though as to some of them the witnesses disagree. The important question—in fact the only one in the case as it now stands—is as to the admissibility of the evidence of this oral contract in view of the fact that there is a written contract upon which the action is based. We have it found by the jury that the contract in question was made by the parties on the faith of the verbal agreement. That the defendants knew of the Todd scale for pulpwood is clear, because they not only made it and adopted it, but they contracted with the plaintiff for the two previous seasons on that basis. In addition to this, Munee, the defendants' manager had been told of this rule, and knew what it was before the present contract was made, containing precisely the same provisions as to the scaling as the previous contracts did.

It is abundantly clear, therefore, that the liability of the defendants as represented by the present verdict is based upon the actual bargain between the parties and their actual intention as to its effect. Are these intentions to be defeated by the rule of evidence referred to? This contract must, I think, be regarded as a New Brunswick contract for pulpwood. It was made in the province; it was to be executed in the province; the land from which the logs were to be cut and place of delivery are also in the province. While it is clear from the contract that the logs were to be scaled—that is, that their contents were to be determined—by a measurement of some kind, no particular system or method is stated.

Irrespective of the statute to which I shall presently refer, and in the absence of any special agreement, the method of scaling must either have been regulated by some usage to be read into the contract, or left to the uncontrolled judgment of each individual scaler. The statute in question is 8 Edw. VII. ch. 26, passed on the 30th May, 1908, a few days before this

contract was made. It makes a special distinction between the manner of scaling saw-logs, that is logs intended to be manufactured into lumber, and logs cut or intended to be used as pulpwood, either within or without the province. As to pulpwood logs the Act makes special provision as to the measurement.

The plaintiff says: I am not bound by that statute, because we have a special agreement by which the contents of these logs are to be ascertained under the Todd pulpwood rule.

The defendants say: We are not bound by the statute, because our contract provides that the logs are to be scaled by a scaler appointed by us who is to scale "equal to what in his judgment will make good merchantable lumber."

Assuming that the parties can thus contract themselves outside of the statute altogether, the defendants must, as I have already pointed out, resort either to usage or to some special method by which effect can be given to the intention of the parties that the scale shall be equal to what the scaler might to what, in his judgment, will make good merchantable lumber."

As to usage, there is none as to logs for pulpwood. The manufacture of pulp from wood is a comparatively modern industry in this province, and so far as the evidence goes there was not, and outside of the statute of 1908, there is not to-day, any general usage as to the method of scaling logs intended for making pulp. The Bangor scale, so-called, seems to be in general use on the St. Croix for saw-logs; the ordinary New Brunswick scale, I suppose, is in use by the Government scalers and surveyors in other parts of the province for scaling saw-logs.

It seems, however, to be conceded that in order, to adapt these rules to the measurement of logs for pulp, so as to ascertain their full contents, changes and allowances are required. The defendants, however, say that the scale is fixed by the contract itself, that is the logs were "to be scaled by scaler equal to what, in his judgment, will make good merchantable lumber."

This clause, so much relied on, occurs in the written part of the contract, and, therefore, is entitled to have a greater effect attributed to it than to the clause in the printed part; *Glynn v. Margetson*, [1893] A.C. 351, *per* Lord Halsbury, at p. 358. The latter clause must, therefore, control the former. Otherwise it is useless, and its insertion was unnecessary.

What then do those words, "good merchantable lumber" mean as applied to pulpwood logs? It may be said that they leave the whole matter to the judgment of the scaler from whose decision there was no appeal. I cannot agree to this. In all methods of scaling there is much left to the judgment of the scaler, but they contain some arbitrary rules. In addition to this it is to be inferred from a circular issued to the scalers in

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January, 1910, by Mr. Muncee that he entertained no such view. In this circular he says:—

> I did not see you when you were leaving for the woods, so could not give you instructions as to scaling, but Mr. R. E. Lavin tells me that he stated to you what was desired along this line. To confirm his instructions will say that we desire you to carry out the following, to wit: Do not allow taper on logs until they reach twenty-eight (28) feet in length, which means a double length log, allowing for the top log what the rule calls for (inside the bark at the top end). Allow for the butt log what you think is right. It is customary to allow one inch on all butt logs when the total length is from twenty-eight to thirty-six feet, and two inches when from thirty-six to forty-four feet, and three inches when the log is from forty-four feet up. Not anything to be thrown out for crooks. In the matter of allowing for rise you should be very careful to use good judgment.

In giving these instructions Muncee was doing one of two things: He was either interfering with the scalers' judgment as to matters about which they stood indifferent between the parties, which cannot be assumed; or he was himself furnishing them with instructions as to how they should measure the logs—a course altogether unnecessary and improper if the contract itself furnished a rule or requirement for the purpose. He made no allusion to the provision as to merchantable lumber, but struck out a rule for himself, which it is fair to assume he would not have done without consulting the plaintiff if the contract contained provisions necessary for the purpose in language clear and intelligible. It is in such cases that oral evidence is admitted to make plain what by the writing is ambiguous and uncertain, and thus put Court and jury in possession of facts which throw light upon the intentions of the parties obscured in the doubtful language used in expressing it.

In *Shore* v. *Wilson*, 9 Cl. & F. 355, Lord Chief Justice Tindal, at p. 565, states the general rule thus:—

> The general rule I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that in such case evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible . . . The true interpretation, however, of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered as an exception or perhaps, to speak more precisely, not so much an exception from, as a corollary to, the general rule above stated, that where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty

as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party.

In *Bourne* v. *Gatliff*, 11 Cl. & F. 45, the Lord Chancellor, at p. 70, says:—

> There is no foundation for the objection to the direction of the Judge respecting the admissibility of the evidence. That evidence was not offered for the purpose of extending or narrowing the contract, or in any way changing it; but for the purpose of meeting a case which might be made on the other side to establish a custom of delivery at a wharf. It was to explain the meaning of the contract, by shewing what had been the meaning of the parties. It is said that the evidence offered was that of instances of individual contracts. Be it so. That does not render the evidence the less admissible; it may be open to observation on that ground, but it is not inadmissible.

In *Fitzgerald* v. *Grand Trunk R. Co.*, 28 U.C.C.P. 586, affirmed on appeal, 5 Can. S.C.R. 204, it appeared that a verbal agreement had been made for the carriage of oil in covered cars, but the receipt note, which was in writing, made no mention of covered cars. The Court said, at p. 533:—

> The plaintiffs, it is true, signed a shipping note containing nothing about covered cars, but it is very clearly proved that the defendants' agents most expressly contracted so to carry it, and it was upon the faith that it would be so carried, that the oil was shipped and placed in charge of the defendants.

That is precisely what the jury say was done in this case.

In *McAdie* v. *Sills*, 24 U.C.C.P. 606, cited on the argument, it appeared that there was a written contract as follows: "Due William McAdie, $100, payable in lumber." It was held that parol evidence was admissible to shew what kind of lumber the parties intended. Galt, J., at p. 608, says:—

> There is no doubt that the ambiguity in this case is latent, and not patent; and it has always been held that in such a case parol evidence is admissible. Under the term "lumber" all descriptions of wood are included—such, for example, as oak, pine, hemlock, walnut, and a variety of others. It must, therefore, of necessity be competent for the parties to shew what particular description of lumber was intended.

In *Harris* v. *Moore*, 10 O.A.R. 10, a question arose as to the meaning of the words, "to place the wheel in position at the mill," in a written contract. Oral evidence was admitted to shew what the parties meant, as the language was not self-explanatory, but indefinite.

It is unnecessary to multiply cases for they are but some of the many instances in which a well-known principle has been applied. In my view the evidence was admissible not to alter

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or add to the written contract, for it does neither, but to explain and make clear certain passages in the written contract, so doubtful and uncertain in their meaning that without such evidence the actual intention of the parties might and probably would be altogether defeated.

As to interest, we think the plaintiff is entitled to interest from the 1st of September, at 5 per cent.

Appeal dismissed.

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EATON v. DUNN.

Nova Scotia Supreme Court, Graham, E.J., and Russell and Drysdale, JJ. May 10, 1912.

1. CONTRACTS (§ V C 3—402)—RESCISSION ON GROUND OF FRAUD—SALE OF TIMBER LANDS—INABILITY TO PLACE PARTIES IN ORIGINAL POSITION.

Notwithstanding the fact that a vendee was induced to purchase timber lands through the vendor's misrepresentations as to the number of acres thereof, rescission of the contract of purchase will be denied the former after he had entered into a contract with the vendor under which the latter had began to carry on lumbering operations on the land for the vendee, on the ground that, as the parties could not be placed in their original positions, both contracts must stand.

2. DAMAGES (§ III K—214*a*)—WASTEFUL METHOD OF WORKING LAND—SALE OF TIMBER—RIGHT OF VENDOR.

Upon denying a vendee rescission of a contract for the purchase of timber lands where the price to be paid was based upon the number of feet of lumber cut, the vendor's counterclaim for loss occasioned by the wasteful method adopted by the vendee for working the lands will also be denied in the absence of some obligation on the part of the latter as to the method of operation, since, in any event, under the contract of purchase, the land belonged to the vendee.

3. EVIDENCE (§ II E 7—189)—PRESUMPTION AS TO FRAUD ON SALE OF TIMBER LANDS—EXAGGERATED ESTIMATE OF PROBABLE YIELD.

Fraud and misrepresentation as to the probable yield of timber from land cannot be inferred from the vendor's exaggerated estimate thereof, where there was room for a wide difference of opinion on the question.

4. FRAUD AND DECEIT (§ III—12)—RECKLESS STATEMENTS AS TO ESTIMATE OF ACREAGE OF TIMBER LANDS—PRICE BASED ON QUANTITY OF LUMBER PRODUCED.

A statement by a vendor as to the acreage of land sold will amount to actionable fraud where recklessly made without any *bona fide* conviction of its truth, and without regard to the actual facts of the case, notwithstanding the price to be paid therefor was based upon the quantity of lumber produced therefrom.

Statement

APPEAL by the plaintiffs from the judgment of Meagher, J. at the trial dismissing an action for rescission of the sale of timber lands.

The appeal was dismissed.

H. Mellish, K.C., for plaintiffs.

T. S. Rogers, K.C., for defendant.

GRAHAM, E.J., concurred with RUSSELL, J.

RUSSELL, J.:—Eaton, Powell and Jones, the three individual plaintiffs, on May 10th, 1909, made an agreement with Dunn the individual defendant, for the purchase from him of a number of lumbering properties in Hants county, including portable mills and lumbering plant. The property was to be paid for at a figure computed at $2 per thousand superficial feet of the lumber from the lands.

It was estimated that there would be 80,000,000 feet, which would make the price of the property $160,000. But $20,000 was to be paid before any lumber could be produced, the very satisfactory explanation being given that all the parties were confident that at least 10,000,000 feet would be produced, and it was provided that the two last payments might be deferred until it should be ascertained that the property would yield the anticipated quantity.

It was in contemplation of the parties that a company should be formed to conduct the operation and that the individual plaintiffs should thereupon be relieved of liability, and in the meantime the property was conveyed to the Eastern Trust Company. There would be a payment due of $15,000 under the terms of the agreement on May 10th, 1910, but before that date the purchasers became convinced, or at least, professed to be convinced, that neither the acreage of the land, nor the quantity of timber on the land per acre had been truthfully represented to them. The quantity of timber could only be estimated, but the trial Judge has come to the conclusion that the estimates were so grossly excessive that they could not have been made in good faith. The statements of the acreage, he says, were not estimates and he considers as to both acreage and quantity per acre that the defendant Dunn was guilty of wilful misrepresentations, which induced the making of the agreement and in the absence of which the agreement would not have been made by the plaintiffs. He however has refused rescission of the agreement because of the material changes that have taken place in the position of the parties.

The plaintiffs, in January, 1910, made a further agreement with the defendant Dunn, which the trial Judge says was in pursuance of the original intention and design; but it went further, I think, than anything that had been originally agreed upon, because it embodied a contract with the defendant Dunn under which the latter agreed to conduct the lumbering operations under the terms and for the remuneration therein set out.

This agreement is attacked by Dunn on the ground that it was merely executed as an escrow, and it is further complained that advantage was taken of him in the absence of his counsel to procure his signature to a contract of a very burdensome and

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oppressive nature. There can be no doubt that he repented his acquiescence in this agreement very soon after he signed it, but there can be just as little doubt that his repentance came too late.

The trial Judge has found, I think, correctly, that it was not executed as an escrow, and the evidence of Mr. McKenzie, the solicitor who prepared it, is conclusive to the effect that it was deliberately executed by Dunn with full knowledge of its terms.

The argument seemed to me to take a somewhat peculiar turn. Counsel for the plaintiff seemed to concede that if the first agreement should be rescinded the later agreement would have to fall with it. Yet he asked for the rescission of this first agreement, while I did not understand him to object—he did not at least object very strenuously—to the decision of the trial Judge that the second agreement was in full force and effect.

Counsel for the defendant, on the other hand, contended that the first agreement could not be rescinded on any ground short of fraud, which he contended had not been proved.

The learned trial Judge, as already stated, has held that the first agreement cannot be rescinded, because the parties cannot be restored to their original positions, and it seems to follow from this that the second agreement must stand in full force and effect as the learned trial Judge has decided.

The defendant has counterclaimed for loss occasioned by the alleged wasteful methods in which the property has been worked. If the fact of such wastefulness had been established it would be necessary to consider whether it furnished any ground for the recovery of damages by the defendant in counterclaim. The land is not his but the plaintiffs, under the unrescinded original agreement. The most he can say is that the plaintiffs should have secured more lumber from their operations in which case the price of the land would have been greater than it would be under the actual circumstances. But unless they were under some obligation to him as to their methods of operation, I do not see how he could make any use of his contention in this regard.

I do not, however, consider it necessary to pursue this inquiry, because in my opinion the proper manner of conducting the operations is a thing that depends so entirely upon individual opinion and judgment that I do not see how any clear conclusion can be come to. The evidence shews conflicting opinions as to the conduct of the plaintiffs' operations, and the trial Judge has not been able to come to any conclusion adverse to the plaintiffs on this subject. He has on the contrary negatived the contention of the defendant, and I see no sufficient reason for reversing his judgment.

The plaintiffs' contention as to fraud is the representations respecting the probable yield of lumber is also a matter upon

which I should hesitate to draw a positive conclusion. I have no doubt that the defendant's estimate was an exaggerated one, but here again there is room for wide difference of opinion, and it would be difficult to convict him of fraud in respect to such a representation.

The statement as to the acreage of the land stands on a different footing. It was, as the trial Judge has justly observed, not a mere estimate, but a positive statement, and it respected a matter upon which it was the duty of the defendant to be informed.

If, as is quite possible, that alone would not be enough, I think the trial Judge has properly come to the conclusion that such representations as to the total acreage, if not falsely made to the knowledge of the defendant, were made recklessly without any *bonâ fide* conviction of their truth, and without regard to the actual facts of the case, and with a view to securing the agreement of the plaintiffs. This, I think, constitutes actionable fraud. It may be said that as the plaintiffs were only to pay according to the quantity of lumber produced they can have suffered no loss. This, however, does not follow. It may be shewn that they were put to expenses in preparation for the larger operations fairly anticipated, which would not have been incurred if the acreage had been properly represented to them.

The result is that the defendant's appeal should be dismissed with costs and the plaintiff's appeal against the refusal of the trial Judge to rescind the first agreement should also be dismissed, the judgment of the trial Judge being affirmed in its entirety with such possible additions or modifications, if any, in the proposed reference as may be considered necessary to furnish the basis of a final decree.

DRYSDALE, J.:—I do not assent to the finding that the first agreement herein was induced by fraud on the part of Dunn, in misrepresenting acreage. Drysdale, J.

I think it is fairly clear that the parties to the agreement were not paying much attention to acreage. They knew it was a large property, and as the consideration was based on actual lumber to be cut from the properties the question of acreage was not much considered.

I do agree, however, that the second agreement ought to be held binding. I think it was deliberately entered into by all parties with full knowledge of the then existing conditions and rights of all the parties.

As the second agreement is based on the validity of the first it seems to me the effect is that the rights of the parties ought to be worked out on the basis of the first agreement being considered as valid and as varied and changed by the second. In

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my opinion, the questions involved between the parties ought to go for reference or further inquiry on the basis of the second agreement recognizing the validity of the first. I have not overlooked the forceful argument of Dunn's counsel that the second agreement never became binding upon Dunn, but I am of opinion that it did.

It was negotiated by the company's officer and did not require a formal execution by the company to bind. Dunn's acceptance by the company was, I think, enough.

I agree that in the result the appeal ought to be dismissed.

Appeal dismissed.

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C. M. WRENSHALL & A. S. Trimmer, doing business as C. M. Wrenshall & Co. (plaintiffs, respondents) v. J. McCAMMON (defendant, appellant.

Saskatchewan Supreme Court, Wetmore, Newlands, Johnstone and Lamont, JJ. July 15, 1912.

1. BROKERS (§ II B—12)—REAL ESTATE AGENT—COMMISSION—SUFFICIENCY OF SERVICES.

Where land was listed with an agent to sell at a price net to the owner, the agent to receive for his services anything he could obtain over that amount, and the agent found a purchaser ready, willing and able to purchase for a price at a slight advance over the net price and on the terms given by the owner to the agent and the owner refused to sign an agreement for sale the reason that the price was not enough, the agent is entitled to recover on a *quantum meruit* the difference between the net price to the owner and the price the purchaser was willing to pay.

[*Bagshawe* v. *Rowland*, 13 B.C.R. 262, specially referred to.]

Statement

APPEAL by defendant from the judgment at trial in favour of plaintiffs for commission as real estate agents.

The Court being equally divided the appeal was dismissed.

G. E. Taylor, for appellant.

N. R. Craig, for respondents.

Wetmore, C.J.

WETMORE, C.J.:—This is an appeal from the judgment of the Judge of the District Court for the judicial district of Moose Jaw. It was an action brought to recover commission on a sale of land. The learned Judge gave judgment for the plaintiffs for the full amount of their claim, and the defendant appealed. The Judge found the issues of fact in the plaintiffs' favour, and adopted the plaintiffs' version of the conversations which were held between the respective plaintiffs and the defendant.

I am of opinion that the Judge was justified in coming to that conclusion; and I must frankly state that I would have come to the same conclusion myself. But at any rate it is not a case in which this Court should interfere with the findings of fact of the trial Judge. Having reached this conclusion, I

assume that the Judge found from the testimony of the plaintiffs such facts appearing therein as would warrant him in coming to the conclusion that the plaintiffs were entitled to his judgment. In the first place, he must have found that the defendant listed the land in question with the plaintiffs, in fact I do not see how he could help coming to that conclusion, because the defendant practically admits it two or three times in the course of his testimony. He then must have found that the property was listed to be sold so as to net to the defendant $3,500, and that the plaintiffs were to receive for their services whatever they could obtain above that amount. There was no question that the plaintiffs secured a person ready, willing and able to purchase this property for $3,650. He also must have found that they communicated this fact by telephone to the defendant, who approved of it, but the next day refused to carry out the agreement, his only reason given being that the price was not enough. Of course the plaintiffs cannot recover on a special agreement, because they have not received the money out of which the $150 surplus could be retained, but I can see no reason why they cannot recover on a *quantum meruit*, and the statement of claim sets out a *quantum meruit*. Here was a man who was employed to do a certain thing. He has done just the thing that he was employed to do, and he is prevented from being recompensed because his employer will not carry out what he employed him to do. I think this is a case where the employer, having so employed the man, and the arrangement not being carried out by reason of his own default, is bound to pay the employee what his services are reasonably worth. I am of opinion that this is in accordance with what was laid down in *Bagshawe* v. *Rowland*, 13 B.C. Rep. 262, with which I agree. The plaintiffs did not disclose the name of the proposed purchaser, but they were not asked to do so, and their offer was not rejected on that ground. The acceptance of any arrangement the plaintiffs might make was subject to approval, but in so far as price was concerned the plaintiffs procured just what they were authorized to procure. The defendant could not under such circumstances turn around and say, I will not approve your doing what I expressly authorized you to do, and so escape liability. It was admitted the $150.00 (the amount awarded to the plaintiff) was a reasonable amount for his services if he was entitled to recover on a *quantum meruit*.

There were other grounds of appeal stated in the notice of appeal, but they were not pressed at the argument before this Court. I assume they were abandoned, and therefore it is not necessary to deal with them.

In my opinion the appeal should be dismissed and the judgment of the trial Judge affirmed, with costs.

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JOHNSTONE, J., concurred with WETMORE, C.J.

LAMONT, J.:—In their statement of claim the plaintiffs, who are real estate dealers, allege that the defendant employed them to find a purchaser for the north forty-five feet of lot 28, block 23, High Park addition, Moose Jaw, at the price of $3,500.00, payable $600 cash and the balance in six, twelve and eighteen months, and agreed that if they should find a purchaser at the price he would allow them as commission the difference between that price and the sum at which the purchaser was ready and willing to purchase the said lot. They further allege that they found a purchaser ready and willing to purchase at $3,650.00 and that the defendant has refused to pay them the $150.00. The action was tried before the Judge of the District Court for the judicial district of Moose Jaw, who gave judgment in favour of the plaintiffs for the amount of their claim. From this judgment the defendant now appeals to this Court.

For the defendant it was argued that the judgment should be reversed for two reasons: (1) because the plaintiffs were never employed to find a purchaser, and (2) because even if they were so employed, they never introduced a purchaser to the defendant.

According to the evidence of the plaintiff Wrenshall, all that took place when he obtained what he calls the listing of the lot was as follows: Wrenshall was looking for properties to list for sale. He went into the defendant's office to see if anybody there had property for sale. He did not know the defendant. He handed to each person in the office a card on which was inscribed, "Wrenshall and Co., Real Estate, Loans and Insurance." During the conversation which ensued, the defendant informed Wrenshall that he had some properties for sale, and that he usually kept a list of them for real estate men, but that he did not have a list on hand which he could hand out at that time. He, however, offered to let Wrenshall have his (defendant's) own lists if Wrenshall would return them in fifteen or twenty minutes. Wrenshall took the lists over to his own office and made a copy of them and returned them to the defendant. There was a separate list for each parcel of property. The lists shewed the prices at which the defendant was willing to sell his property; these prices were net to the defendant. The price of the lot in question was $3,500, with a cash payment of $600 and the balance in three, six, nine and twelve months. At the bottom of the listing were the words: "Subject to being unsold and my approval." The terms on which the balance was to be paid were subsequently verbally altered to six, twelve and eighteen months. The plaintiffs found a Mrs. Plaxton, who was willing to give $3,650.00 for the lot. Wrenshall then notified the defendant that he had sold the lot. He went to see the defendant, and no

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finding him at home he left a card, which subsequently came into the possession of the defendant, on which was written the words, "Protect me for $150." The defendant made no acknowledgment of this communication. The plaintiffs did not get the cash payment from Mrs. Plaxton. She offered them her cheque for $750, but they did not take it, giving as a reason that they did not need it to close the deal. One of the plaintiffs drew up the agreements, but did not insert therein the purchaser's name. The space in which it should have been inserted was left blank. The reason for this, they state, was that they did not know Mrs. Plaxton's Christian name. The plaintiff Trimmer then took the agreements to the defendant with a cheque of the plaintiff Wrenshall for $600.00. When the agreements were handed to the defendant he said he could not sign them until he had consulted his wife. Trimmer told him he would call in the morning for the agreements. He took the cheque back with him. In the morning he again called upon the defendant, who then refused to sign the agreement, giving as a reason, according to the evidence of Trimmer at the trial, that he had been offered a better price, although on his examination for discovery Trimmer made no mention of this. The same day Wrenshall called up the defendant by telephone and asked him if he was not going to sign the agreement, and the defendant said no. Wrenshall then told him that he was liable for his commission. This the defendant denied. The defendant was not asked to sign any other agreement, nor was he asked to complete the sale in any way other than by signing the agreement presented by the plaintiff Trimmer. He was not told who the purchaser was, nor did he know until the examination of the plaintiffs for discovery in this action, that Mrs. Plaxton was the purchaser. On these facts are the plaintiffs entitled to recover?

As to the first of the above contentions, that the plaintiffs were not employed by the defendant to secure a purchaser, I am of opinion the argument on behalf of the defendant is sound. The listing of the land with the plaintiffs, if what took place between the defendant and Wrenshall can properly be called a listing at all, amounted to no more than an undertaking by the defendant that if the plaintiffs secured a purchaser who was willing to buy at a price which would give the defendant $3,500.00 net he would sell the lot to that purchaser, and if the purchaser was willing to pay more than that sum, the defendant would, out of the purchase-money over and above that sum, allow the plaintiffs a reasonable amount for their services: *Newstead* v. *Rowe*, 17 W.L.R. 171. Where an owner lists his land at a price net to him, there is no agreement on his part either express or implied that he will pay a commission to the agent who finds a purchaser except out of the excess of pur-

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chase-money over and above the stipulated net price. The evidence shews this was clearly understood by the plaintiffs in the present case, for the plaintiff Wrenshall admitted that they never intended that the defendant should pay any commission, as they were to take the remuneration for their services out of the purchase-money. The liability of the defendant to the plaintiffs, therefore, depended upon his receiving for the lot a sum over and above $3,500.00, and as he did not receive any purchase-money at all, cannot be liable for commission on the sale of the lot or on a *quantum meruit*, for services rendered. Both these claims presuppose on the part of the defendant an agreement express or implied to pay whether a sale goes through or not. No such agreement can, in my opinion, be spelled out of what took place between the parties. There being no agreement on the part of the defendant to pay the plaintiffs anything except out of the purchase-money, their remedy, where no sale has taken place, would be an action for damages for refusal to carry out his agreement to complete the sale when they found a purchaser. I am therefore of opinion that the plaintiff's claim is wrongly founded, and that they cannot recover in this action.

But, even if the plaintiff's action had been properly framed, I am still of opinion that they could not recover, because the evidence does not shew that the defendant ever refused to carry out the sale made. All he refused to do, all he was asked to do, was to sign an agreement which did not contain the name of any purchaser. He was, in my opinion, clearly justified in refusing to sign any such agreement, and it is immaterial what his reasons for refusing were. Where real estate agents have lands listed with them for sale at a price net to the owner, they must, in order to succeed in an action for damages for refusal on part of the owner to complete a sale made by them, satisfactorily shew that they secured a purchaser ready and willing to purchase at a price in advance of the net price, and on the terms stipulated by the owner, that they made known to the owner not only the fact that they had secured a purchaser ready and willing to complete on the owner's terms, but also the name of the purchaser, and in addition they must shew that they requested the owner to complete the sale to the purchaser so found by them, and that he refused so to do. It is not enough for the agent to inform the owner that the land is sold, and to ask him to complete by signing an agreement for sale in blank so far as the name of the purchaser is concerned. A vendor is entitled to know with whom he is called upon to enter into an agreement before he can be responsible for refusing so to do, and the onus is not upon him to make inquiries, but upon the agent to convey the information, if he wishes to hold the owner liable for damages for refusing to complete. Having reached this conclusion,

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it is not necessary for me to determine the effect upon the rights of the parties of the words at the end of the listing sheets: "subject to being unsold and my approval."

The appeal should, in my opinion, be allowed, the judgment of the Court below reversed, and judgment entered for the defendant with costs both of the Court below and of this appeal.

NEWLANDS, J., concurred with LAMONT, J.

The Court being equally divided the appeal was dismissed.

Appeal dismissed.

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Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. May 20, 1912.

1. BROKERS (II A—6)—REAL ESTATE BROKERS—OPTION TO PURCHASE—COMMISSION.

The fact that the payment of a commission, if a sale was made, was provided for in an agreement giving a person an option to purchase property does not constitute him the vendor's agent.

2. FRAUD AND DECEIT (§ II—5)—CONCEALMENT OF FACTS ENHANCING VALUE—DEFENDANT'S INTEREST—COMMISSION.

A sale of land will not be set aside on the ground that a third person for whose benefit it was purchased in the name of a stranger, obtained an option giving a firm of real estate brokers the right to purchase it which option he intended to use for his own benefit and concealed from the vendor knowledge of facts tending to enhance the value of the property, where the real estate brokers were not interested in such purchase other than to receive the commission which the vendor had agreed to give them if the property was sold and all negotiations pertaining to the sale to the stranger were conducted by the person for whose benefit it was purchased on his own behalf and not as agent for the brokers.

3. FRAUD AND DECEIT (§IV—16)—WHAT AMOUNTS TO FRAUD—KNOWLEDGE OF PARTY MAKING STATEMENTS.

A sale of land will not be set aside on an allegation that a third person by falsely representing that he was acting as an agent or employee of a firm of real estate brokers and, mentioning the name of a probable purchaser, obtained from the vendor an option giving the firm the right to purchase his property, though it was his intention to deceive the vendor and to purchase the property in another name for his own benefit.

4. VENDOR AND PURCHASER (§ I E—27)—EXECUTED CONVEYANCE—SETTING ASIDE—ABSENCE OF FRAUD.

An executed conveyance of land will not, in the absence of evidence of positive fraud, be set aside on the ground that it was taken in the name of a person other than the real purchaser, where it does not appear that the vendor would have refused to sell had he been aware that the vendee named in the conveyance was not the real purchaser.

[*Bell* v. *Macklin*, 15 Can. S.C.R. 576; and *Brownlie* v. *Campbell*, 5 A.C. 925, specially referred to.]

5. FRAUD AND DECEIT (§ II—5)—CONCEALMENT OF FACTS ENHANCING VALUE—PURCHASE OF LAND IN STRANGER'S NAME.

Where it was not alleged that one who negotiated for the sale of land which was purchased for his benefit in the name of a stranger,

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was the vendor's agent, and he and the vendor acted at arm's length, false representations to the vendor that he knew of nothing that would enhance the value of the property, are not sufficient to justify setting aside the sale.

6. BROKERS (§ II A—7)—REAL ESTATE BROKER—PAYMENT OF COMMISSION—AGENT—FIDUCIARY RELATION.

The fact that, without the knowledge of the vendor, commissions he had agreed to pay to a real estate agent upon the sale of property the latter had an option to purchase, were paid by such agent to a person who, in the negotiations for the purchase ostensibly acted as agent for the person to whom the property was conveyed, but really purchased it for his own benefit, will not make him the vendor's agent, or create a fiduciary relation between them.

Statement

AN appeal by the plaintiffs from the judgment of Mathers, C.J.K.B., in an action to set aside a sale of property on the ground of misrepresentations.

The appeal was dismissed, RICHARDS, J.A., dissenting in part.

The following judgment at the trial was delivered by

Mathers, C.J.

MATHERS, C.J.K.B.:—I find that neither Enderton nor Shepard bought the property in question from the plaintiffs, and that they have not now, and never had, any interest therein.

It is not pretended that the defendant Simpson took any other part in the transaction than to allow his name to be used.

I find that the relationship of principal and agent did not arise at any time, from the inception of the negotiations until the close of the transaction, between the plaintiffs and the defendant, Russell.

The plaintiffs charge that Russell made false representations to induce them to sell, upon which they acted to their prejudice. I find that that charge is not sustained by the evidence.

The action will be dismissed as to all the defendants, with costs, to be taxed without regard to the statutory limit of three hundred dollars ($300.00).

Messrs. *J. E. O'Connor*, K.C., *C. P. Fullerton*, K.C., and *C. Isbister*, for plaintiffs.

Messrs. *A. J. Andrews*, K.C., and *H. A. Burbidge*, for Enderton and Shepard.

C. P. Wilson, K.C., and *V. Gordon*, for defendant Russell.

Howell, C.J.M.

HOWELL, C.J.M.:—I have read the judgment of my brother Cameron, and concur with his views. The plaintiffs allege in paragraph 7 of the statement of claim, and reiterate in paragraph 14, that they agreed to sell to Bell or his nominees or to Enderton & Co., and agreed to pay the latter $1,000 commission, and at the trial they put in and proved an option or agreement to sell to Enderton & Co. and not to Bell, and in that agreement there is a covenant to pay Enderton & Co. a commission of $1,000.

It is not alleged in the pleadings, and there was no attempt at the trial to prove, that this document was really not an agreement to sell, but an appointment of agency, and it is clear that up to the time of the execution of this document Enderton & Co. were not the plaintiffs' agents to sell this property.

A sale can be made by a principal to an agent which will undoubtedly be good as against the principal, but if a sale is made to a third person who is really buying for the agent without the knowledge of the vendor, on this ground alone the sale will be set aside: *McPherson* v. *Watt*, 3 A.C. 254; *Lewis* v. *Hillman*, 3 H.L.C. 607. However, in this case the plaintiffs allege that they agreed to sell to their agent, creating the agency by the agreement of sale, but the grievance is that they conveyed to Simpson, who was, they allege, really Enderton & Co. I cannot see what was wrong in this: *Pisani* v. *Attorney-General*, L.R. 5 P.C. 516, at p. 540.

Howell, C.J.M.

It is claimed that representations were made by Enderton & Co., their agent, which induced the sale. This could not be, for they were not agents for sale until the agreement for sale was executed.

This subject need not be followed further, for I am satisfied Simpson's name was used, not for Enderton & Co., but for Russell.

The appeal is dismissed with costs.

RICHARDS, J.A. (dissenting in part):—In this case I should not feel justified in disturbing the finding of the learned trial Judge that Messrs. Enderton & Co. did not in fact enter into the transaction in any way.

Richards, J.A.

The evidence, however, shews that the defendant Russell did enter into it, purporting to act on behalf of another party, but actually acting for himself, and that he asked the plaintiffs for, and was allowed, a commission. He was, in fact, the purchaser himself, and he concealed this fact from the plaintiffs. He was aware of matters which, if he was the plaintiffs' agent, it was his duty to disclose to them, and which, if disclosed to them, would, I think, have prevented their selling to him, and which would, if he was their agent and bought from them, entitle them to have the sale set aside and the property re-conveyed to them because of the non-disclosure.

It is argued on behalf of the defendant Russell that the so-called commission was really, and to the plaintiffs' knowledge, only a rebate in price, and that the plaintiffs knew that he purported to act only for the supposed purchaser, and not for them. It is true that they thought so, and there is no doubt that he so represented the fact to them. Then the question arises whether by taking a commission from the vendor, even although he might be acting for a purchaser, he would not, in fact, make himself

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their agent also and render it his duty to disclose to them all he knew which might affect the probability of their making the sale.

It is argued that it is the custom for agents, approaching the owner of property with a view to purchase, to really act for the purchaser, as Mr. Russell purported to do in this case, and yet to take a commission from the vendor. There is no doubt that is frequently done in transactions in Manitoba. But I cannot see that the taking of a commission in such a case can be treated, as between the agent and the vendor, as merely a rebate in price, or as a payment, in effect, by the purchaser of the commission, because of the price being rebated to the extent of the commission.

To my thinking, to lay down a doctrine of that kind would be most dangerous, and would lead to disastrous consequences. It seems to me that it would in effect be a holding that agents are under no liability to their principals, as it would be easy in every case for the agent to allege that he purported to act on behalf of the purchaser, and thereby escape all liability to do that which his agency for the vendor, of which the taking of the commission is strong, if not conclusive, evidence, binds him to do. I think this would be particularly the case where the agent is, in fact, the purchaser himself. It seems to me that unless the sum which the principal allows to be taken off the price is distinctly agreed to as being, and in fact is, a rebate in the price, the agent cannot, by any allegation that he treated it as such, although asking for it as a commission, escape his liability as agent of the vendor.

It is argued on behalf of the defendant that the plaintiffs have stated in their evidence that they do not see what they have lost. If the sale had been really to a third party, as Mr. Russell pretended and they thought, and not one to Mr. Russell, they would have got no more than they now get under the sale to Mr. Russell, and that, I think, was what was in their minds when stating that they did not see what they had lost. But that is altogether apart from the right of a principal to require an agent, who has bought from him while guilty of concealment of material facts (one of which is the fact that he, the agent, is the real buyer) to reconvey. Whether they did, or did not, think they had made any loss, is, to my mind, immaterial in such a case.

In my opinion Mr. Russell did, by taking the commission, which, I think, was really treated as a commission paid by vendor to agent, no matter what it is now called, make himself the agent of the plaintiffs, and lay himself under an obligation to disclose to them that which he concealed, as to facts which would indicate a probable advance in values in the neighbourhood where

the property was situated, and as to the fact that he, the agent, was the actual purchaser. If that be the case, that he was their agent, then, as a result of the concealment, he has no right, it seems to me, to retain the property.

The plaintiffs' pleadings do not on their face make out their case against Russell as an agent as clearly as they should have. But all the facts of the transaction were gone into at the trial. It is not shewn that anything, not in evidence, could have been so given if the pleadings had been different. The case against Mr. Russell seems to me proved by his own testimony. I do not know that an amendment of the pleadings would be necessary to make him liable. But if necessary I think an amendment should be allowed.

I would dismiss the appeal without costs as against the defendants Enderton & Co., but would allow it with costs as against the defendant Russell, and order that, on repayment by the plaintiffs of the amount paid them on the purchase money, and the discharge by them of the mortgage taken for balance of purchase money, the defendants Russell and Simpson should execute such documents as are necessary to reconvey the property, clear of encumbrances to the plaintiffs.

Perdue, J.A.

PERDUE, J.A.:—The plaintiffs' claim for relief is by no means clearly expressed in the statement of claim. A number of alleged grievances, more or less inconsistent with each other, are set out, but it is difficult to ascertain what is the plaintiffs' actual cause of complaint. Only one of the plaintiffs, Martin Kelly, gave evidence when they were attempting to prove their case. The only grievance he even remotely refers to in his evidence is, that if he had known that Simpson was a partner in the firm of Enderton & Co., he would not have transferred the land to him. And yet the document upon which the transaction rests is an option of purchase given by the plaintiffs to Enderton & Co. This option was signed by both the plaintiffs and gave Enderton & Co. the right to purchase the property at the price and on the terms set forth, and agreed to give the latter a commission of $1,000 on the sale going through. Further, in the seventh paragraph of the statement of claim the plaintiffs allege that they agreed to sell to Bell, or his nominee, or to the firm of Enderton & Co. on the terms contained in the option and to pay the latter a commission of $1,000. I can find no evidence shewing that the option was given to Enderton & Co. to enable them to sell as agents for the plaintiffs, and there is nothing, except the agreement to allow a commission on the sale to themselves going through, to prove that they were the plaintiffs' agents.

The other plaintiff, Michael Kelly, was called in rebuttal at the very close of the case. We can assume that he would then know, if he would ever know, what cause of complaint he and his

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co-plaintiff had against the defendants or any of them. And yet, even then, he was quite unable to say what grievance the plaintiffs had. He was asked: "What was your injury?" After an objection by his counsel, the trial Judge ruled that he should answer, and the answer he gave was: "I wouldn't say there would be any injury," followed by a statement shewing that his objection was to paying a commission. He was again pressed with the question: "What was the injury to you?" and his reply was: "There might be no injury."

The first material allegation in the statement of claim is, that prior to the sale the defendants Enderton and Shepard were employed by the plaintiffs as their agents in the rental of stores, and that they assumed to act as agents for the plaintiffs in the sale of the property. It is then alleged that prior to the same date the defendants knew that the Hudson's Bay Company were about to buy the property opposite to the plaintiffs', a fact which would greatly enhance the value of the plaintiffs' property; that the defendants, knowing that values would be enhanced, in conjunction with other parties formed the design of purchasing properties in the vicinity, including that of the plaintiffs; that thereupon Enderton and Shepard, through their agent, approached the plaintiffs and finally obtained the option above referred to. The complaint following upon these allegations is that the name of Bell was used in the first place and the name of Simpson afterwards when the conveyance was given, for the purpose of deceiving the plaintiffs and concealing from them that Enderton and Shepard were the real purchasers of the land. Dealing with the case attempted to be made by the plaintiffs down to this point, I think it is clear they must fail. Enderton and Shepard both denied in the most positive manner that they or either of them were purchasers of or interested in the property. The defendants offered no direct evidence contradicting this, but endeavoured, at great length, to shew by entries in the books of Enderton & Co., by the manner in which Russell the actual purchaser, paid for the land and by other circumstances, that Enderton & Co. must have been interested. I think that all these matters, although tending to raise suspicion, were sufficiently explained by the defendants. I agree with the trial Judge in finding that the plaintiffs completely failed to establish this branch of the case.

The next allegation is that, during the negotiations for purchase, Enderton and Shepard, through their representative or agent, concealed from the plaintiffs the facts in relation to the proposed purchase by the Hudson's Bay Company and the probability of an increase in the value of the plaintiffs' property. But the evidence proves that Russell was the actual purchaser, that he, acting in his own interests and not for Enderton & Co.,

personally conducted the negotiations with the plaintiffs, and that he took from them the option in the name of Enderton & Co., intending to use it for his own benefit. The action must, therefore, fail as against Enderton and Shepard.

As against the defendant Russell, the first allegation is that he, falsely representing that he was an employee or agent of Enderton & Co., falsely represented to the plaintiffs that the said Bell wanted to buy the land, whereas in fact Russell was buying for himself. This is followed by allegations that the plaintiffs, relying on the said representation, gave the option above referred to, that Bell was "a mere straw man" whose name was used to deceive the plaintiffs and conceal the fact that Russell was the real purchaser, and for the purpose of avoiding the giving of a covenant. As, however, the option was taken in the name of Enderton & Co. and the name of Bell was only mentioned and not actually used, nothing can be founded upon these allegations.

The next allegation sets forth that the plaintiffs, in assumed pursuance of said sale, upon receiving the cash payment less the $1,000 commission, conveyed the land to the defendant Simpson. There is a further allegation that Simpson was a man of little means, that the purchase money was advanced by Russell, that he was the real purchaser, and that the transfer of the land was taken in Simpson's name for the purpose of avoiding a covenant on the part of Russell, and to conceal that the latter was the real purchaser. It is then averred that if the plaintiffs had known that Russell was the real purchaser they would not have sold the land to either him or Simpson.

This involves consideration of the question whether the sale can be avoided by the plaintiffs on account of the concealment of the name of the real purchaser, where, as it is alleged, the vendors would not have sold if they had known who the real purchaser was.

> The law seems now to be that where one person is deceived as to the real party with whom he is contracting, and that deception either induces the contract or renders its terms more beneficial to the deceiving party or more onerous to the deceived, or where it occasions any other loss or inconvenience to the deceived party, there the contract cannot be enforced against him; but that where none of these circumstances can be shewn to follow from the deception, the contract may be enforced.

Fry's Sp. Per., 5th ed., p. 107, citing *Fellowes* v. *Gwydyr*, 1 Sim. 63, 1 R. & My. 83. That statement of the law applies only while the transaction is *in fieri* and to proceedings for specific performance, the affording of relief in such a case being in the discretion of the Court. But where a conveyance has been executed and delivered, nothing in the way of misrepresentation, short of actual positive fraud, will warrant a judicial rescission

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between vendor and purchaser: *Bell* v. *Macklin*, 15 Can. S.C.R. 576, 581; *Brownlie* v. *Campbell*, 5 A.C. 925. The plaintiffs in order to set aside the conveyance would be bound to establish fraud to the same extent and degree as in an action for deceit. The misrepresentation in the present case was not shewn to have been material. There was no evidence produced, when the plaintiffs were proving their case, to shew that they would not have conveyed to Simpson if they had known that Russell was the real purchaser. The vague statements made by one of the plaintiffs in rebuttal cannot be accepted as proof of this portion of the case.

The last allegation to be dealt with is that Russell falsely represented to the plaintiffs that "he knew of nothing doing up in the vicinity of the property in question herein," and concealed from the plaintiffs the knowledge that he had of the active movement in the neighbouring properties. There is no allegation that Russell was the plaintiffs' agent and there is no evidence whatever to support such an allegation. Both plaintiffs considered that he was acting for the purchaser and not for them. The plaintiffs, it is true, agreed to pay Enderton & Co. a commission on the sale, and this commission, unknown to them, went to Russell. They and Russell, as the evidence shews, were at arm's length during the negotiations. As Michael Kelly admits, Russell was endeavoring to secure the best terms he could get and the plaintiffs were trying to do the best possible for themselves. The allowance of the commission to Enderton & Co., the holders of the option, seems to me to have been more in the nature of a concession made as a part of the transaction itself than of a remuneration from a principal to an agent. Only a four days' option to purchase was given as a result of the negotiations between the parties. No commission was earned for securing the option. It was only on a sale going through that a commission became payable. The fact relied upon to establish the relation of agency did not take place until after the negotiations were concluded and the alleged misrepresentations or concealments made. If Russell had not exercised the option no commission would have been received and there would not have been a tittle of evidence to support the contention as to his agency. Receiving the amount of the commission through the generosity of Enderton & Co. after the sale had been completed did not constitute him the agent of the plaintiffs or create a fiduciary relationship towards them.

I agree that the appeal should be dismissed with costs.

Cameron, J.A.

CAMERON, J.A.:—The learned Chief Justice, who tried this action, held that neither Enderton nor Shepard bought the property in question and that neither of them ever had any interest

therein. The evidence is overwhelmingly in support of that finding, and it would appear to me out of the question to disturb it.

The defendant Russell was not originally a party to the action. The allegations with reference to him in the statement of claim are in the following paragraphs:—

I. Paragraph 2 wherein R's occupation and residence are stated.

II. Paragraph 4 alleges knowledge on the part of all the defendants that certain property on Portage avenue was "under option" and that a large business concern was about to purchase it, thereby enhancing its value.

III. Paragraph 3 alleges that R. represented to the plaintiff "that he was from the office of the defendant C. H. Enderton & Co.," knowing that the plaintiffs understood from that fact that he was an employee of Enderton & Co. and intending that they should so believe, and represented falsely that he was acting as agent of that firm for the purpose of purchasing the property for one Bell, who wanted to buy the same, whereas R. intended to purchase for himself.

IV. Paragraph 14 alleges that Russell retained the signed option.

V. Paragraph 16 alleges that the plaintiffs received the cash payment of $25,000, "less $1,000 deducted by the said firm of C. H. Enderton & Company . . . for the said defendant Russell for commission as aforesaid, which said commission was retained . . . by the defendant Russell."

VI. Paragraph 17 alleges that while the conveyance was made to Simpson, the purchase money was advanced by Russell, and the transfer was taken in Simpson's name, to deceive the plaintiff as to Russell's identity as purchaser and to avoid giving a covenant for the unpaid purchase money.

VII. Paragraph 18 alleges that the plaintiffs were ignorant that Russell was the purchaser or they would not have sold to him.

VIII. Paragraph 19 alleges that Russell "falsely represented to the plaintiffs that he knew of nothing doing up in the vicinity of the property in question herein." Also that Russell concealed his knowledge of the options aforesaid, of the "prospect of a forward movement in real estate," and of the purchase by a large business concern of a block of land near the property involved.

I have set out above the allegations of the statement of claim which affect the defendant Russell, and upon which relief against him is asked. Upon consideration it seems to me that these allegations disclose no cause of action. It is nowhere alleged that Russell was agent for the plaintiffs. The allegation as to

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the representation made by him in paragraph 3 is directly to the contrary, viz., that he came from Enderton & Co.'s office and was acting as their agent to purchase for Bell.

The allegations in paragraphs 17, 18 and 19 are immaterial in the absence of any allegation that there was a duty on Russell's part toward the plaintiffs to do the things he is stated to have failed to do, or not to have made the representations he is alleged to have made. I find it difficult to attach any precise meaning to the allegation in paragraph 19 that Russell "falsely represented to the plaintiffs that he knew of nothing doing, etc."

As to the allegations in paragraph 16. The allegation here is (so far as it affects Russell) that Enderton & Co. deducted from the purchase money $1,000 for Russell for commission "as aforesaid." This commission is referred to in three previous paragraphs of the statement of claim. (1) In paragraph 7, where it is stated "the plaintiffs agreed to pay the said firm of C. H. Enderton & Company a commission of $1,000 for effecting such sale." (2) In paragraph 9, it is alleged that the plaintiffs "upon receiving the cash payment of $25,000, less $1,000 deducted for the said commission," conveyed the said land, etc. (3) In paragraph 14 it is again alleged that the plaintiffs agreed to pay Enderton & Co. a commission of $1,000 for effecting such sale. So that we must read the above allegation in paragraph 16 as follows: "$1,000 deducted by Enderton & Co. for the defendant Russell for commission agreed to be paid by the plaintiffs to Enderton & Co." Now this, if it means anything, means that Enderton & Co. deducted commission agreed to be paid to them by the plaintiffs for the benefit of Russell, or, in other words, made a gift of that sum to Russell. What there is in this for the plaintiffs to complain of I cannot see.

I examined these allegations with strictness, because it is upon the allegation in paragraph 16 that Russell's agency must depend. There is nothing alleged to constitute the relation of agency except the payment of the commission as set forth above. If that commission was agreed to be paid, not to Russell, but to Enderton, and was given voluntarily by Enderton to Russell, that is something not affecting the plaintiffs in any way, and wholly failing to raise any question of a fiduciary relationship between the parties.

Apart from this view of the pleadings, I think the evidence of the plaintiffs is conclusive as to the relationship existing between them and Russell. They clearly looked upon him in no other light than as agent for an intending purchaser. The negotiations between them were plainly at arms' length. Even if the allegations in the pleadings had been sufficiently wide to cover the grounds urged on the argument, it seems to me, under the circumstances and in view of the evidence, that the payment

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to Russell of the $1,000 or the allowance to him of that amount on account of the purchase money, in whatever mode it may be regarded, is not sufficient, of itself, to constitute a confidential and fiduciary relationship between the parties such as would vitiate the transaction involved.

I think the judgment appealed from should be affirmed with costs.

Cameron, J.A.

HAGGART, J.A., concurred with the majority of the Court.

Haggart, J.A.

Appeal dismissed, RICHARDS, J.A., *dissenting in part.*

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July 15.

BROWN v. BANNATYNE SCHOOL DISTRICT.

(Decision No. 2.)

Manitoba King's Bench. Trial before Mathers, C.J.K.B. July 15, 1912.

1. CONTRACTS (§ IV D—360)—BUILDING CONTRACT—TIME FOR FINAL PAYMENT—STATED TIME AFTER COMPLETION—NECESSITY OF PROCURING ARCHITECT'S FINAL CERTIFICATE.

A stipulation in a building contract to the effect that final payment should be made within twenty days after the substantial completion of the structure, does not mean twenty days after the architect's final certificate was given, and an action begun three days after the giving of such certificate was not premature, where the building was substantially completed more than twenty days before.

2. CONTRACTS (§ IV D—360)—CONDITION PRECEDENT TO PAYMENT—EXPIRATION OF TIME FOR FILING LIENS—WHAT EVIDENCE IS NECESSARY.

Where a building contract provided that if the contractor did not give satisfactory proof that there were no liens against the building, final payment should be made two days after the expiration of the time within which liens might be filed, it is no defence to an action by the contractor for the balance of the contract price due him brought after the expiration of the time within which liens might be filed, that he did not give satisfactory evidence that no liens existed other than of his own or liens of which he held discharges.

3. CONTRACTS (§ IV D—363)—BUILDING CONTRACT—CONCLUSIVENESS OF FINAL CERTIFICATE—RIGHTS OF CONTRACTOR IN RESPECT TO DEPOSIT.

As an architect's final certificate is conclusive as to the completion of a structure by a contractor, upon the giving of such certificate, the contractor is entitled to have returned to him a deposit made to secure the execution of the contract, or which was given in lieu of a bond as security for the performance of the contract.

4. DAMAGES (§ III A 7—97)—BUILDING CONTRACT—LIQUIDATED DAMAGES FOR DELAY IN COMPLETING CONTRACT—COMPLETION OF PART EARLIER THAN ENTIRE STRUCTURE.

A stipulation for liquidated damages for delay in the completion of a school-house by a contractor, applies only to the completion of the building as a whole and not to the finishing of two rooms therein, as required by the contract, at a date earlier than that fixed for the completion of the entire building.

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5. DAMAGES (§ III A7—97)—LIQUIDATED DAMAGES FOR DELAY IN COMPLETING CONTRACT—OCCUPATION OF BUILDING BEFORE TIME FIXED FOR COMPLETION.

Liquidated damages stipulated for in a contract for the building of a school-house, for delay in completing it, cannot be awarded where the school district secured the use of rooms therein sufficient to accommodate all of the pupils of the district, which were finished before the time fixed by the contract for the completion of the entire building.

6. DAMAGES (§ III A—42*a*)—MEASURE OF DAMAGES ON BUILDING CONTRACTS—TEACHERS' SALARIES FOR PERIOD SCHOOL NOT COMPLETED—KNOWLEDGE OF SCHOOL OFFICERS.

Money paid by a school district for teachers' salaries for the time they were unable to teach, because of the non-completion of a school-house within the time stipulated in the contract for its erection, cannot be recovered by the district, as non-liquidated damages for delay in the completion of the building, where, at the time the teachers were engaged, the school officers knew that the building would not be ready for occupancy at the beginning of the school term.

7. DAMAGES (§ III A—42*a*)—BUILDING CONTRACT—LIABILITY OF CONTRACTOR FOR DAMAGES FOR DELAY IN COMPLETING BUILDING—ALTERATIONS AND EXTRAS—REASONABLE TIME.

One for whom a building is constructed by a contractor, cannot recover damages for delay in completing it within the time limited by the contract, where the delay was due to changes or extra work ordered by the owner, as, under such circumstances, the contractor is required only to complete the building within a reasonable time.

[*Grey* v. *Stephens*, 16 Man. L.R. 189, referred to.]

Statement

ACTION in which the plaintiffs seek to recover $9,474.50, as the balance of the contract price for building a school building for the defendants. They also seek to recover the sum of $2,410.10, deposited by them with the defendants as security. The defendants counterclaim for damages for delay in completing in time.

Judgment was given for the plaintiff.

C. P. Fullerton, K.C., and *J. P. Foley*, for plaintiffs.

J. B. Coyne and *A. W. Morley*, for defendants.

Mathers, C.J.

MATHERS, C.J.K.B.:—The trial of the action was begun on the 4th April last, when the plaintiffs completed their case. Evidence was tendered for the defence tending to shew that the building was incomplete. This evidence was objected to on the ground that the architect's certificate proved by the plaintiff was under the contract conclusive. I reserved this question and adjourned the further hearing.

On the former hearing [*Brown* v. *Bannatyne School District* (Decision No. 1), 2 D.L.R. 264, 22 Man. L.R. 260, 21 W.L.R. 80] I decided this point in favour of the plaintiff, but the further hearing was not proceeded with until the 8th July instant.

It is now contended that the plaintiffs cannot recover because the action was premature. By the terms of the contract a final

payment is to be made within twenty days after substantial completion, which, it is argued, means twenty days after the architect's final certificate where, as here, the building is not actually completed, but a deduction is made by the architect in respect of the unfinished work. The plaintiffs did no work on the building after the 21st December, 1911. The architect gave his certificate on the 10th February. This certificate is conclusive evidence that the work is completed. There is nothing in the contract to make the architect's certificate a condition precedent to the accrual of a right of action. The right to payment accrued to the plaintiff at the expiration of twenty days from the time when the plaintiffs had substantially fulfilled the contract. The evidence shews that time to be the 21st December. The architect's certificate is only the evidence required to prove completion, and if procured at any time before the plaintiffs were called upon to close their case, it would be in time. It does not fix the date of completion. That date is fixed by other evidence at a time more than twenty days before action. This objection, therefore, fails.

It was also objected that the plaintiffs had not given satisfactory evidence that no mechanics' liens other than their own or liens of which they hold discharges exist. If they do not do this, final payment is to be made within two days after the time for filing liens has expired. The plaintiffs completed the work on the 21st December, 1911, and left the building on that day. The last day on which to file mechanics' liens was thirty days from that date, or the 20th January, 1912. As the action was not begun until the 13th February, 1912, there is nothing in this objection. It was admitted, on the argument, that no liens other than the plaintiffs' have ever been filed, so that the objection, at best, was highly technical.

The plaintiffs are entitled to recover the amount shewn in the architect's certificate, viz., $9,474.50, and interest thereon from the date of the certificate at 5%.

In addition to this, the plaintiffs claim the return of the deposit paid with their tender.

The meaning of the contract and specifications is by no means clear. Article 1 provides that the contractor shall, under the direction and to the satisfaction of the architect, provide all the materials and perform all the work mentioned in the specifications and shewn on the drawings and details and in accordance therewith. By Article 2 the contractor is to deliver the whole work clean, complete and perfect in every respect in accordance with the plans and specifications. Then comes Article 9, which shews that under certain circumstances the contractors are to be entitled to a final certificate without completing the work in every detail. Under this clause the architect made a deduction of $1,200, and on the 10th February last issued his final certifi-

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cate. I have already held this to be a final certificate, and the matter need not be again dealt with. Under this article such final certificate is conclusive evidence of the fulfilment of the contract by the contractors. That means, I take it, that the contractors have done all they are required to do. Any further work required to absolutely complete the building in every detail must be done by the owners, and paid for out of the amount deducted by the architect. By the terms of the specifications the deposit was made to secure the execution of a contract by the contractor, but, if that is not the meaning of the specifications and the deposit was made in lieu of a bond for the performance of the work, the architect's certificate is conclusive evidence that the work is performed, and the plaintiffs are now entitled to a return of the deposit.

The defendants counterclaim for delay in completion, and here, again, I find the terms of the contract very obscure and difficult to construe.

Article 6 is as follows:—

> The contractors shall complete two rooms ready for occupation by the first day of September, 1911, an additional room by the fifteenth day of September, 1911, and the contractors shall complete the whole of the works comprehended in this agreement by the fifteenth day of November, A.D. 1911; provided that the contractor shall for every day after the date herein fixed for completion thereof that the owners shall be delayed solely through the contractor's fault in obtaining any use and benefit of the works, pay to the owner as liquidated damages for such delay at the rate of six per centum per annum on the total amount of the contract price. In no case shall the owner be entitled to claim over six per centum per annum on the said contract price by reason of any special damage from delay.

Now, in the first place, I do not think this provision applies to anything but the completion of the whole work on the 15th November, 1911, and that liquidated damages are not given for the non-completion of either the two rooms on the 1st September or the additional room on the 15th September. It says "the whole of the works" are to be completed by November 15th. That is the date fixed for "completion thereof"—*i.e.*, of the whole of the works. For that failure only is liquidated damages provided. The whole work was completed, in so far as the architect required it to be done, on the 21st December, so that the only delay to be accounted for is from the 15th November to the 21st December. The right to damages, however, accrues to the defendants only in so far as they were delayed solely through the default of the plaintiffs in obtaining "any use and benefit of the works." It is admitted that from and after the 20th October the defendants occupied two of the school rooms, and that such two rooms accommodated all the children on the school register. The defendants, consequently, had some

use and benefit of the building, and are not entitled to liquidated damages for non-completion on the 15th November.

The defendants' counsel argued that if the contract did not give liquidated damages for non-completion of the rooms on the 1st and 15th September, he was entitled to claim unliquidated damages for the plaintiffs' breach of contract in respect to the completion of these three rooms. The damages claimed are for teachers' and caretakers' salaries from the 1st of September. The defendants, when they engaged these teachers, knew that no rooms would be ready before the 15th September, and that the completion of two by that date was contingent upon the weather. In the face of this they employed teachers from the 1st September. No sufficient excuse for thus deliberately incurring this expense was given. On the 14th September changes in the blackboards were ordered by the architect, on instructions from the defendants, and another order was given on the 18th September, acknowledged by the plaintiffs on the 20th. It is not clear how long the work was delayed by this change. The plaintiffs say a foot of new plastering around three sides of the rooms had to be done; that the weather conditions were such that it dried very slowly, and that the work was thereby delayed twelve to fourteen days.

The rooms were completed on the 29th September, so that there is only fourteen days to be accounted for. The defendants having ordered extras to be done, under *Grey* v. *Stephens*, 16 Man. L.R. 189, the parties become at large as to completion of these rooms, and the plaintiffs were only bound to complete within a reasonable time. The onus of proving that the time taken was unreasonable was on the defendants, and they have failed to satisfy it. The defendants are, therefore, not entitled to recover anything on their counterclaim.

There will be judgment for the plaintiffs for $11,877.60, and interest at 5 per cent. from the 10th February, 1912, and costs of suit.

There will be a declaration that the plaintiffs have a lien on the property for $9,474.50 and interest thereon, and they are entitled to the appropriate relief prayed for enforcing the same.

The counterclaim will be dismissed with costs.

Judgment for plaintiffs.

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Sept. 5.

Re LAND REGISTRY ACT; Re THE ROYAL TRUST COMPANY Limited.

British Columbia Supreme Court, Murphy, J. September 5, 1912.

1. MORTGAGE (§ I D—17)—VALUATION OF MORTGAGES—MEANING OF "TRUE VALUE"—R.S.B.C. 1911, CH. 127, SEC. 176.

The "true value" of a mortgage under section 176 of the British Columbia Land Registry Act, R.S.B.C. 1911, ch. 127, does not necessarily mean the nominal amount secured by the mortgage, and, if the registrar is not satisfied with the value as affirmed, he must proceed as directed by section 176 to ascertain the true value.

AN application by way of appeal from the ruling of the registrar under R.S.B.C. 1911, ch. 127, made pursuant to the direction of the inspector of legal offices, that the value of a mortgage for the purpose of fixing the percentage to be paid on its registration is the full amount for which it is given as security.

An order was made referring matter back to the registrar.

Sir Charles Hibbert Tupper, K.C., for applicant.

Hannington, in person.

Murphy, J.

MURPHY, J.:—Section 176 of the Land Registry Act directs that mortgages shall be valued at their true value in a manner similar to that provided by section 175 for valuation of land unless the registrar for sufficient cause shewn direct otherwise.

Section 175 directs that value of land is to be ascertained by the solemn declaration of the applicant. If the registrar be not satisfied as to the correctness of the value so affirmed he may require production of other evidence or a certificate of such value under the hand of a valuator. No such course has been adopted here but the registrar by direction of the inspector of legal offices has ruled that the value of a mortgage for registration purposes is necessarily the full amount of money for which it is given as security. To my mind there is nothing in the sections quoted authorizing the registrar to make such ruling. The method of procedure is clearly set out in sections 176 and 175 and is to be adhered to unless the registrar "for sufficient cause shewn" direct otherwise. This means, I think, that the registrar may vary the methods of addueing such further proofs as he may require on the applicant shewing him sufficient cause why the provisions of section 176 in that regard are impracticable or inconvenient. This qualification is not sought to be invoked here. My judgment in this case is that if the registrar is not satisfied with the correctness of the value as affirmed he must proceed as directed by section 176 to ascertain the "true value" of the mortgage. Whatever the "true value" may mean I hold it does not necessarily mean the nominal amount secured by the mortgage. If it did, there would be no need for the elaborate provisions set out in said sections for its ascertainment. The matter is referred back to the registrar to follow the directions herein set out. Should any difference arise between the applicant and the registrar as to the meaning of "true value" the matter may be spoken to again in the present proceedings.

Order accordingly.

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June 22.

Alberta Supreme Court, Beck, Stuart, Simmons and Walsh, JJ. June 22, 1912.

1. PERJURY (§ II C—60)—SUFFICIENCY OF MODE OF ADMINISTERING OATH—FUNCTION OF JUDGE TRYING CHARGE.

Notwithstanding the method of administering an oath to a witness lies within the control of the trial judge, upon a subsequent prosecution for perjury the sufficiency of the manner of administering the oath on the trial in which the perjury is alleged to have been committed, is to be decided by the judge presiding at the perjury trial.

2. PERJURY (§ II E—80)—FORM OF ADMINISTERING OATH—CHINAMAN ALLEGING HE WAS A CHRISTIAN SWORN ACCORDING TO CHINESE CUSTOMS.

A Chinaman cannot be convicted of perjury where, when presented as a witness in the case in which the false testimony was alleged to have been given, in response to a question from the clerk of the court, the accused stated that he was a Christian and that he desired to be sworn upon the Bible, but, under the directions of the trial judge, without further inquiry or any assent on the part of the Chinaman, the clerk administered the Chinese oath by burning paper, as under such circumstances no binding oath was administered.

[*The Queen's Case*, 2 Br. & B. 284, referred to.]

Statement

CRIMINAL appeal by the defendants, two Chinamen named Lee Tuck and Lung Tung, who had been convicted of perjury upon a trial held before Harvey, C.J.

The alleged false oaths were charged as having been made upon a trial before His Honour Judge Crawford, District Judge.

The appeal was allowed.

P. J. Nolan, for the appellants.

W. M. Campbell, for the Crown.

Beck, J.

BECK, J.:—Although it was held in *The Queen's Case*, 2 Br. & B. 284, 22 R.R. 662, that if a witness, without objecting to it, takes an oath in the usual form, he may be afterwards asked whether he thinks the oath binding upon his conscience; but it is unnecessary and irrelevant to ask him if he considers any other form of oath more binding, and such a question cannot be asked; yet it seems that, where the question is raised before he is sworn, he ought to be sworn or go through such other ceremony as is most binding upon his conscience.

> As the purpose of it is to bind his conscience, every man of every religion should be bound by that which he himself thinks will bind his own conscience most: *per* Mansfield, L.C.J., in *Atcheson* v. *Everitt*, Cowp. 389.
>
> *Omychund* v. *Barker*, 1 Atk. 21, has settled that it ought to be taken in that form and upon that sanction which most effectually binds the conscience of the party swearing: *per* Alderson, B., in *Miller* v. *Salomons*, 8 Ex. 778.
>
> Lord Kenyon sent into the Common Pleas to consult Lord Chief Justice Eyre, who expressed himself of opinion that, although the witness was not of any particular sect, yet if he stated (whether his reason was a good or a bad one) that there was a particular mode of swearing which was most consistent with his feelings of the obliga-

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tion of an oath, this mode ought to be adopted: *per* Lord Erskine in *Queen Caroline's Trial*, 2 Hans. Parl. Dec., 2nd series, 911, quoted in Wigmore on Evidence, sec. 1818.

See also *Brown* v. *Brown*, 1 R. & M. 77.

When it is said that the form ought to be that most binding upon the witness's conscience, this must refer to forms which are looked upon as judicial forms and suitable for use in judicial proceedings, for one can well imagine the existence or devising of extra-judicial forms which some witness might consider more binding upon his conscience than any form hitherto used in any judicial proceedings. In order to ascertain what form of oath will be binding on him, the Court should require this of the witness himself; and the proper time for making this inquiry is before he is sworn: Taylor on Evidence, p. 1388 (a); *The Queen's Case*, 2 Br. & B. 284, 22 R.R. 662.

It obviously is the duty of the Judge, and not that of the jury, to decide such a question as the form of oath to be administered or other ceremony to be performed whereby the conscience of the witness is to be bound. It is he who must find the facts upon which he eventually decides the question of law. It is a case similar to that of the admission of secondary evidence (Taylor on Evidence, sec. 23 (a)); and upon all such questions there is a right of review of the Judge's finding.

The Judge of the District Court before whom the proceedings occurred at which it is alleged perjury was committed was, therefore, not only competent, but it was his duty, the question having been raised, to inquire and determine what was the form of oath most binding upon the consciences of the prisoners, then witnesses in the proceedings before him.

In respect to the exercise of his duty in this regard the maxim undoubtedly applies—to quote it in its extended form—*omnia præsumuntur rite et solemniter esse acta donec probetur in contrarium.*

The evidence against the presumption that the District Court Judge administered on oath which was binding upon the conscience of the prisoners was given by the deputy clerk of the District Court and the interpreter, and is as follows:—

> Q. And you did not ask either of these two men what form of oath was binding on his conscience? A. I asked them whether they were Christians and how they swore.
>
> Q. Did you ask them whether they were Christians or not? A. Yes.
>
> Q. How did you ask them—in what language? A. In the English language.
>
> Q. Do you know whether they could speak English? A. I did not know, but they said "yes."
>
> Q. You told me before the magistrate at Blairmore that you did not know whether these men could speak any English, and I presume that is correct? A. Yes.

Q. So you did not know whether either of them could speak English? A. No, I cannot tell you.

Q. And you do not know, as a matter of fact, whether they are Christians or not? A. No.

Q. *Were they asked by anybody what form of oath was most binding on their consciences? A. No.*

Q. Did not get any opportunity to do that? A. No, they were never asked that.

Q. But you instructed them to write their names on a piece of paper and burn it, and swear that their souls would burn in hell if they were not telling the truth, the same as the paper was burning? . . . .

Q. And these other two men may be Christians too, and, if so, you should have sworn them on the Bible? A. Yes.

Q. And, if so, this form of oath that you made them take need not necessarily be binding on their consciences? That is so, is it not? A. I do not know whether it is binding on their consciences or not.

Q. And you did not ask? A. No.

Q. You simply instructed them to write their names on a piece of paper and burn it? A. Yes.

(Questioned by Mr. Campbell.) Now tell us exactly how they came to be given that oath. Under whose instructions was it, and how was it that they came to be given that oath, the way it was given? Did you do it? A. I was told to swear them by burning paper, which I did.

Q. By whom? A. By Judge Crawford, and I swore them that way.

Q. You might just say—*you say they knew enough English to say yes when you asked them if they were Christians. What words of English did they use? A. They said "yes." That is the question I always ask witnesses if they are foreigners. I ask them whether they are Christians and how they swear. And I said, "Are you a Christian and do you swear by the Bible?" and they said "yes."* Those are the words I said.

(Questioned by Mr. Campbell.) Was the oath interpreted to them that they did swear? Did you swear that oath to Mar On and did he translate that to each of them? A. Yes.

Q. And what applies to one applies also to the other? A. Yes.

Q. And, as far as you can now say, those were the words you said? A. The exact words I used were: "You swear that as this paper burns so may your soul burn in hell if you do not tell the truth at the hearing of these appeals or this appeal—at each appeal."

(Questioned by Mr. Nolan.) You told Mr. Campbell that the usual formula used with regard to all witnesses that seem to you to be not English-speaking witnesses—the form was, "Are you a Christian and do you swear on the Bible? A. Yes.

Q. Did you say that to these people? A. Those are the very words I said.

Q. And they said yes? A. Yes.

Q. And you were instructed by the trial Judge to swear them on the piece of paper? A. Yes. . . .

Q. Was Lee Tuck sworn? A. Yes.

Q. Now, tell these gentlemen how he was sworn? F. In that Court he was sworn by burning paper. The first time he ask for the Bible, but they made him burn the paper.

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Q. Is that the proper way of Chinese swearing? A. There are quite a few ways. Some cut the chicken's head.

Q. Tell us about the burned paper? A. In the first Court it was by the Bible, and next Court it was by burning paper.

Q. Now forget all about Lee Tuck and tell these gentlemen and His Lordship whether the burned paper is the way the Chinese swear? A. Yes.

Q. Is it the proper way for Chinese to swear? A. Yes. . . .

THE COURT:—Before I address the jury, Mr. Nolan, I would like to know whether you want to have the question of the oath treated as a fact or as a question of law?

Mr. Nolan:—Surely the jury are entitled to find as a fact on the evidence.

THE COURT:—If I treat it as a question of fact, and ask them if they come to the conclusion that that was an oath binding on their consciences, what is there left that I can reserve for the Court *en banc*?

Mr. Nolan:—There is the question of law as to whether these men were sworn at all. It is partly a question of law and partly a question of fact. A jury may by their verdict say they are not satisfied, because they do not think there is sufficient evidence to shew that the men were sworn.

THE COURT:—Unfortunately, in criminal cases it is not customary, and I do not think there is any precedent for asking the findings of particular facts by questions; but I think I will adopt your views as to the question of fact and direct them as to that; it will, perhaps, be the better way.

Were it not for certain portions of the evidence above, particularly the part italicised, I should be of opinion that it ought to be presumed that the learned District Court Judge took steps to ascertain what form of oath was most binding upon the consciences of the prisoners—the only probable reason why, after they had stated that they were Christians, he directed them to be sworn as pagan Chinese are usually sworn, being presumably that, as the result of inquiry of themselves, he became satisfied that they were not in reality Christians, and that the Christian form of oath was either not binding upon their consciences or at least was not more binding than the pagan Chinese form of oath. In view, however, of this evidence, I think the presumption is rebutted.

This being so, their conviction for perjury should, in my opinion, be set aside.

Stuart, J.

STUART, J.:—In this case I am of opinion that the conviction should be set aside.

The method of administering the oath to witnesses in Court is a matter entirely in the hands of the Judge who is conducting the proceedings. Therefore, upon a subsequent prosecution for perjury, I think the method in which the oath has been administered in the previous trial, where the perjury is alleged to have been committed, is a matter of law for the Judge presiding at the trial for perjury to determine. In a sense, of course, the jury must find whether or not the evidence alleged to have been false

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was in fact given under oath, but the sole fact for them to determine is whether or not a certain ceremony or form was gone through.

The question of the sufficiency or correctness of that form or ceremony is a question of law entirely for the presiding Judge. If the Judge presiding at the first trial finds it necessary to discover certain facts in order to determine what form of oath is to be administered, his finding in regard to these facts cannot, as I conceive the law to be, be reviewed or inquired into upon the trial for perjury, except, perhaps, by the Judge presiding thereon. The jury presiding at the second trial, at any rate, certainly have nothing to do with the question.

In the present case the first trial took place before His Honour Judge Crawford. The accused, then witnesses, were asked by the clerk if they were Christians. They said they were. They said they wished to be sworn upon the Bible. Then, without any further inquiry, so far as the evidence shews, the presiding Judge directed the Chinese oath by a burning paper to be given them.

It is clear also from the evidence before us that the accused, being in strange surroundings, in what is to them a foreign country, simply did as they were told by the Judge who was in control. In my opinion, they should not, in such circumstances, be taken to have assented to the administration to them of the oath in the Chinese form. It was, in my opinion, forced upon them. Up to the moment at which this direction was given, the only facts before the presiding Judge were that these men stated that they were Christians and desired to be sworn on the Bible, and also the fact that they were evidently of the Chinese race. This is all the Chief Justice had before him upon the perjury trial.

The next question, therefore, is whether the Chief Justice should have decided that, upon the undisputed facts, the proper form of oath had been administered to these men, and that they were in consequence properly sworn. In my opinion he had clearly a right to review the decision of the District Court Judge and, I think, that right of review should have been exercised in a sense adversely to the correctness of the District Court Judge's decision. If there were any indication in the evidence that inquiries were made by the District Court Judge which were not put in evidence at the perjury trial, it is possible that the Chief Justice should have presumed that the result of such inquiries justified the District Court Judge in taking the course which he did take. But there is no suggestion in the material before us that the District Court Judge made any inquiries at all; and, in these circumstances, I am unable to see how we can presume that he had good reasons for exercising his authority in the way which he did.

The result of the opinion in *The Queen's Case*, 2 Br. & B. 284, 22 R.R. 662, seems to me to be that, when these men stated that

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they were Christians and desired to be sworn on the Bible, that settled the question as to the proper form of oath to be given them, unless something else was revealed which would justify a departure from that form. Nothing else was, in my opinion, revealed at all. The mere evident fact of race was not sufficient; and if there was in fact anything more ascertained by the District Court Judge, I think the burden of proof was upon the Crown, on the trial before the Chief Justice, to shew what that was. Nothing further was shewn; and we can, therefore, only assume that the District Court Judge forced the Chinese oath upon these men after they had declared that they were Christians and wanted to be sworn on the Bible upon no other ground than that they were evidently of Chinese race.

With much respect, I am of opinion that this course was improper, and that no proper oath was ever administered to these men. It seems to me that any other decision would leave it in the power of a presiding Judge to fix, arbitrarily and without evidence at all, the form of oath which should be administered to a witness, and prevent his action from being reviewed in any way whatever. This cannot, I think, be the law. The result is that I think the Chief Justice should have told the jury that the accused were not upon oath when they gave the testimony complained of, and so directed the jury to acquit.

The conviction should be set aside and the accused discharged.

Simmons, J.

SIMMONS, J.:—The defendants were tried before two magistrates at Blairmore on a charge of illegally having in their possession opium, and convicted. Against this conviction the defendants appealed, and the appeal was heard before His Honour Judge Crawford, when the defendants, through an interpreter, gave evidence on their own behalf. They were subsequently charged by the Crown with having committed perjury at the hearing of this appeal, and tried before the Chief Justice and a jury, and convicted, and the defendants now appeal from the refusal of the Chief Justice to state a case for the opinion of the Court *en banc* on the following question of law:—

> Does it appear from the evidence of R. E. Mercer and Mar On that the accused were each properly sworn when giving evidence on his own behalf at the sittings of the District Court of the District of Macleod, held at Blairmore, Alberta, before His Honour Judge Crawford, on the 11th, 12th, and 13th days of April, A.D. 1912, being the occasion upon which the said perjury is alleged to have been committed?

Robert E. Mercer, deputy clerk of the District Court, and Mar On, who was the Chinese interpreter at the hearing of the appeal before Judge Crawford, gave evidence for the Crown at the trial.

Robert E. Mercer says that he swore the interpreter, Mar On, in the Lee Tuck case, and that there was no shorthand reporter at the trial; and further says that no notes were taken in Court.

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On cross-examination, he said he administered the oath in Chinese fashion, under instructions of the Judge; that the deponent wrote his name on a piece of paper and burned it, while burning it, he said to them that they were to swear that as this paper burns so may their souls burn in hell if they do not tell the truth on the hearing of this appeal. Mercer further said:—

Q. And you did not ask either either of these two men what form of oath was binding on his conscience? A. I asked him whether they were Christians and how they swore?

Q. Did you ask them whether they were Christians or not? A. Yes.

Q. How did you ask them—in what language? A. In the English language.

Q. Do you know whether they could speak English? A. I did not know, but they said "yes."

Q. You told me before the magistrate at Blairmore that you did not know whether these men could speak any English, and I presume that is correct? A. Yes.

Q. So you did not know whether either of them could speak English? A. No, I cannot tell you.

Q. And you do not know, as a matter of fact, whether they are Christians or not? A. No.

Q. Were they asked by anybody what form of oath was most binding on their consciences? A. No.

Q. Did not get any opportunity to do that? A. No, they were never asked that.

Q. But you instructed them to write their names on a piece of paper and burn it, and swear that their soul would burn in hell if they were not telling the truth, the same as the paper was burning?

Q. And these other two men may be Christians too, and, if so, you should have sworn them on the Bible? A. Yes.

Q. And, if so, this form of oath that you made them take need not necessarily be binding on their consciences? That is so, is it not? A. I do not know whether it is binding on their consciences or not.

Q. And you did not ask? A. No.

Q. You simply instructed them to write their names on a piece of paper and burn it? A. Yes.

(Questioned by Mr. Campbell.) Now tell us exactly how they came to be given that oath. Under whose instructions was it, and how was it that they came to be given that oath, the way it was given? Did you do it? A. I was told to swear them by burning paper, which I did.

Q. By whom? A. By Judge Crawford, and I swore them that way.

Q. You might just say—you say that they knew enough English to say "yes" when you asked them if they were Christians. What words of English did they use? A. They said "yes." That is the question I always ask witnesses if they are foreigners. I ask them whether they are Christians and how they swear. And I said, "Are you a Christian and do you swear by the Bible?" and they said "yes." Those are the words I said.

(Questioned by Mr. Campbell.) Was the oath interpreted to them that they did swear? A. Did you swear that oath to Mar On, and did he translate that to each of them? A. Yes.

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Q. And what applies to one applies also to the other? A. Yes.

Q. And, as far as you can now say, those were the words you said? A. The exact words I used were: "You swear that as this paper burns so may your soul burn in hell if you do not tell the truth at the hearing of these appeals or this appeal—at each appeal."

Q. And what did you do then? . . .

(Questioned by Mr. Nolan.) You told Mr. Campbell that the usual formula used with regard to all witnesses that seem to you to be not English-speaking witnesses—the form was, "Are you a Christian and do you swear on the Bible? A. Yes.

Q. Did you say that to these people? A. Those are the very words I said.

Q. And they said "yes"? A. Yes.

Q. And you were instructed by the trial Judge to swear them on the piece of paper? A. Yes.

Mar On, the interpreter, gave evidence as follows:—

Q. Was Lee Tuck sworn? A. Yes.

Q. Now tell these gentlemen how he was sworn? A. In that Court he was sworn by burning paper. The first time he ask for the Bible, but they made him burn the papers.

Q. Is that the proper way of Chinese swearing? A. There are quite a few ways. Some cut the chicken's head.

Q. Tell us about the burned paper? A. In the first Court it was by the Bible, and next Court it was by burning paper.

Q. Now forget all about Lee Tuck and tell these gentlemen and His Lordship whether the burned paper is the way the Chinese swear? A. Yes.

Q. Is it the proper way for Chinese to swear? A. Yes.

The interpreter, Mar On, further said that he did not know whether the defendants were Christians or not.

At the close of the case for the Crown, Mr. Nolan, for the defendants, said:—

I beg to object that there is no case to go to the jury, on the ground that the evidence goes to shew that these men, when put in the witness-box, said that they were Christians, and said that they wanted to be sworn on the Bible, and were not permitted to do so, and there is no evidence that the oath that was given to them was binding on their consciences, as required by law.

The learned Chief Justice did not accede to this.

No evidence was offered in behalf of the defendants, and the following discussion took place:—

THE COURT:—Before I address the jury, Mr. Nolan, I would like to know whether you want to have the question of the oath treated as a fact or as a question of law?

Mr. Nolan:—Surely the jury are entitled to find as a fact on the evidence.

THE COURT:—If I treat it as a question of fact, and ask them if they come to the conclusion that that was an oath binding on their consciences, what is there left that I can reserve for the Court *en banc*?

Mr. Nolan:—There is the question of law as to whether these men were sworn at all. It is partly a question of law and partly a question of fact. A jury may by their verdict say that they are not satisfied because they do not think there is sufficient evidence to shew that the men were sworn."

THE COURT:—Unfortunately, in criminal cases it is not customary, and I do not think there is any precedent for asking the findings of particular facts by questions; but I think I will adopt your views as to the question of fact and direct them as to that: it will perhaps be the better way.

We have before us the circumstances that the Crown witness on cross-examination said he asked the defendant if he was a Christian, and the defendant said he was: and then, under instructions from Judge Crawford, he administered the Chinese oath to the defendant. It is contended that the maxim, *Omnia præsumuntur rite et solemniter esse acta donec probetur in contrarium*, applies, and that we must presume that His Honour Judge Crawford took steps to satisfy himself that the Chinese oath was more binding upon the conscience of the defendants than the Christian oath; but I am not able to apply the maxim to such an extent.

By the common law of England every witness must be sworn according to some religious ceremony or other. There is, however, at common law no prescribed form of oath: it is that which the witness declares to be binding on his conscience, and he is always allowed to adopt the ceremonies of his own religion: Roscoe's Nisi Prius, 8th ed., p. 159.

Where a witness is desirous of making an affirmation instead of taking the oath, it is the duty of the Judge presiding at the trial himself to examine the witness and ascertain that he objects to being sworn on the ground that he has no religious belief or that the taking of an oath is contrary to his religious belief. A witness who states that he has a religious belief cannot be allowed to affirm: *Rex* v. *Moore*, 17 Cox C.C. 458.

Abbott, C.J. (House of Lords), in *The Queen's Case*, 2 Br. & B. 284, 22 R.R. 662, says:—

> The most correct and proper time for asking a witness whether the form in which the oath is about to be administered to him is one that will be binding upon his conscience, is before the oath is administered; but, inasmuch as it may occasionally happen that the oath will be administered in the usual form by the officer of the Court before the attention of the Court or party or counsel is directed to it, we think that the party ought not to be precluded: . . . and though the witness produced in a Court of law shall have taken the oath in the usual form as therein administered, without making any objection to it, he may, nevertheless, be afterwards asked whether he considers the oath he has taken as binding upon his conscience . . . and, if the witness in answer to that question shall declare in the affirmative, namely, that he has taken an oath binding upon his conscience, he

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cannot then be further asked whether there be any other mode of swearing that would be more binding upon his conscience than the one which has been used.

In *Sells* v. *Hoare*, 3 Br. & B. 232, in the Court of Common Pleas, it was held that a witness was subject to the consequences for perjury who, though a Jew, gave himself a false name at the trial and was sworn on the Gospels.

The principle, so well established at common law, of recognising the peculiar religious belief of the witness, has been extended by statute to those who declare they have no religious belief, or who, for conscientious reasons, refuse to take the oath in the usual manner, and they are now allowed to affirm.

It is quite clear from the evidence of the witness Mercer and the interpreter Mar On that the defendants were deprived of this well-recognised right. Any examination of the witness by the clerk was quite improper, and should have been made by the Judge, and it does not appear that the presiding Judge deprived them of the right to swear in accordance with their declaration of religious faith on any other than arbitrary grounds, and he laid no foundation whatever for practically forcing them to take an oath in a form at variance with their declared religion.

There does not appear to be any question but that they would have subjected themselves to the penalties for false swearing if they had been sworn on the Gospels, and had then wilfully given untruthful evidence.

I am of the opinion that, if a conviction was obtained upon evidence given under such circumstances, it would be quashed on the ground of inadmissibility of the evidence of the witness, namely, that he had not been properly sworn; and it seems to me that the same rule should be applied here, and the appeal allowed and the conviction quashed.

Walsh, J.

WALSH, J., concurred.

Appeal allowed.

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Aug. 10.

BARSKY (complainant) **v. SERLING et al.** (respondents).

Quebec King's Bench (Crown Side), Gervais, J. August 10, 1912.

1. DEPOSITIONS (§ I—2)—RIGHT TO APPOINTMENT OF A COMMISSIONER TO TAKE FOREIGN COMMISSION—CRIM. CODE, 1906, PART XV.

A person is entitled as a matter of absolute right to the appointment of a commissioner to take depositions of witnesses in another country for use in Canada in a summary proceeding under Part XV., Crim. Code, 1906.

2. DEPOSITIONS (§ I—2)—RIGHT TO FOREIGN COMMISSION—NECESSITY OF FURNISHING SECURITY—CRIM. CODE, 1906, PART XV.

Security cannot be required of an applicant for a commission to take depositions of witnesses in another country for use in Canada in a summary proceeding, in the absence of a formal text of law authorising it, under Part XV., Crim. Code, 1906.

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3. DEPOSITIONS (§ II—8)—TAKING AND RETURNING FOREIGN COMMISSION—FAILURE TO FURNISH INTERROGATORIES—COURT PROCEDURE (QUE.) ART. 385*a*.

An open commission under art. 385*a*, Civil Procedure, Quebec, will issue to take the depositions of witnesses in a foreign country for use in a summary proceeding under Part XV., Crim. Code, 1906, where the parties to the application agreed there should be but one commissioner appointed, but did not agree in the first instance that they would not furnish interrogatories and cross-interrogatories, and it was alleged that the petitioner had caused the departure of the witnesses from Canada in order to prevent their testifying.

Statement

MOTION for a commission to take evidence out of the jurisdiction in a criminal case, the subject of pending summary proceedings under Part XV. of the Criminal Code, 1906.

The application was granted.

Peter Bercovitch, K.C., for the motion.

S. W. Jacobs, K.C., *contra*.

Gervais, J.

GERVAIS, J.:—On behalf of the complainant, the Court is, by petition, asked to appoint a commissioner to proceed to the examination of certain witnesses, formerly of Montreal, but now residing in the city of New York.

By written authority of record from the Attorney-General of the Province of Quebec, the petitioner has been authorized to take the present proceedings.

The respondents claim that the petitioner himself caused the departure from Canada of the witnesses in question, who were workmen imported into Canada in violation of the Alien Labour Act, R.S.C. 1906, ch. 97, with the object of preventing them from testifying during the present proceedings; and the Court is called upon to order, in any event, security for all the expenses to be incurred, including those of the commissioner and of counsel for the respondents, in the execution of the commission.

The petitioner has an absolute right to the appointment of a commissioner to take the depositions of the witnesses whose names are recited in the petition.

No special provision is made by the Criminal Code respecting warranty of payment of expenses upon commissions of this kind, whether it be by deposit or by the giving of security. Provisions of law which entail penalties are not susceptible of a wide meaning; on the contrary, they must be restrictively interpreted. So that, in the absence of a formal text of law to authorize it, an accessory punishment, in the form of a money penalty, cannot be added to the statutory sanction.

As it will rest with the Court below to pronounce the guilt or the innocence of the accused, so it is the duty of that Court to determine to what costs they shall be condemned, under Part XV. of the Criminal Code relating to summary convictions.

This is not a case of treason nor of an indictable offence, tri-

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able under Part XVIII., or Part XVI., or before a jury, in which costs and expenses of prosecution may be ordered to be paid by party convicted.

There is no provision in the law for the payment of attorney fees by the opposing party, in a case tried under Part XV. of the Criminal Code.

The statement made on behalf of the respondents that the complainant secured the departure of said witnesses from Canada is contradicted by affidavits filed on behalf of the complainant.

Articles 716, 735 and 770, 779, 1044, 1045, 1046, 1047, 1048, 1049, 1050 C.C. are referred to. See also 997 C.C. 385, 385a C.P. (Que.).

The parties have not agreed, in the first place, that they would not furnish interrogatories and cross-interrogatories to be allowed upon the present commission; that, therefore, the same would not be closed, according to art. 385, Code of Civil Procedure of the Province of Quebec, but that it would be open; and, in the second place, the parties have agreed that there would be but one commissioner and that the same would be Mr. James Keenehan, stenographer, of Montreal.

It is our decision, under the exceptional circumstances alleged before us, that the ends of justice will be better served, by allowing an open commission in accordance with art. 385a of the said Code of Civil Procedure.

The attorney for the petitioner is now present at the delivery of this judgment and one S. W. Jacobs, acting for the defendants, has requested to be considered as also present at the said delivery.

The petition is granted; a writ of rogatory commission is ordered to issue; Mr. James Keenehan, stenographer, of Montreal, is appointed, under the same, a commissioner as prayed for and in accordance with the instruction annexed to the said writ; and he is ordered to make a return of his open commission to the undersigned Judge, or any Judge of this Court, on or before the fourteenth day of September next; costs to follow event of suit; under reserve, as to whom right may appertain, to pursue the recovery of such costs before a Court having jurisdiction.

Order for commission.

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Aug. 31.

Nova Scotia Supreme Court, Graham, E.J., Meagher and Ritchie, JJ. August 31, 1912.

1. JURY (§ I D—31)—RIGHT TO TRIAL BY—JUDICIAL DISCRETION AS TO DISPENSING WITH.

Prima facie a party who has given a jury notice has a right to a jury trial subject to deprivation of such right if a judge so orders, but this order will not be made except upon good cause shewn by the party attacking the notice, as, for instance, that only questions of law are involved.

2. JURY (§ I D—31)—RIGHT TO TRIAL BY JURY—WRONGFUL STRIKING OUT OF JURY NOTICE—ISSUES OF FACT RAISED ON PLEADINGS.

Where issues of fact are raised upon the pleadings which must be settled before the question of liability or non-liability can be ascertained, it is a wrong exercise of his discretion on the part of a judge in chambers, to strike out the jury notice and such exercise of discretion is a proper subject for review.

[*Hunt* v. *Chambers*, 20 Ch.D. 365, followed.]

3. VENUE (§ II A—15)—CHANGE IN CIVIL ACTION—GROUNDS FOR—DIFFICULTY IN OBTAINING UNPREJUDICED JURY.

Where it appears from the affidavits read that a strong feeling exists in the county in which the venue is laid which will make it difficult to obtain a jury with no interest in the matters involved, the court will order the venue to be changed to a county in respect to which no such difficulty exists.

4. VENUE (§ II A—16)—CHANGE—CONDITION OF FREE TRANSPORTATION TO WITNESSES—APPLICATION BY RAILWAY COMPANY.

Where the defendant seeking a change of venue was a railway company the order granting the change should be made conditional upon the defendant affording free transportation for the plaintiff and his witnesses upon their line of railway to and from the place to which the venue was changed.

Statement

THIS was an appeal on the part of plaintiff from that part of the judgment of Russell, J., in chambers, striking out plaintiff's jury notice on the ground that the case was mainly a question of law and could be better tried by a judge than by a jury, and on the part of defendant from that part of the same judgment which refused defendant's application for a change of venue on the ground that the jury notice having been struck out there was no reason for dealing with the question of changing venue.

In the months of September, October and November, 1911, plaintiff purchased large quantities of apples for shipment to parties in Manitoba and other parts of Western Canada and in order to enable him to perform his contracts applied to the defendant for cars by which to ship the apples to their destination. It was alleged that defendant refused to and did not furnish cars to plaintiff for this purpose, by reason whereof plaintiff was unable to perform his contracts and lost the profits he would otherwise have made, and for this he claimed damages.

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Statement

Defendant's motion was for an order changing the place of trial of the action from Bridgetown in the county of Annapolis to Halifax in the county of Halifax or to some county other than a fruit growing one traversed by the railway of the defendant company, or in the alternative to strike out the jury notice. In support of the motion affidavits were read shewing that a strong feeling of resentment existed against the defendant company in the county of Annapolis and in the Annapolis Valley generally on account of the failure of the company, for reasons set out, to provide cars and that in consequence of such feeling it would be impossible to obtain a fair trial in said county.

The appeal was allowed and the venue changed.

J. L. Ralston, for plaintiff.

W. A. Henry, K.C., for defendant.

Ritchie, J.

RITCHIE, J.:—In my opinion the jury notice should not have been struck out. The statute provides that when a notice requiring trial by jury is given the case is to be tried with a jury subject to the following proviso:—

> Provided that upon an application to the Court or to a Judge made before the trial or by the direction of the Judge at the trial, such issues may be tried or such damages assessed or inquired of by a Judge without a jury notwithstanding such notice.

I read this statute to mean that *primâ facie* the party who has given a jury notice has the right to a jury trial, subject to a liability to be deprived of such right if a Judge so orders, and this order will not be made except upon good cause shewn by the party attacking the notice, as, for instance, that only questions of law are involved. There is also provision in the rules for a trial without a jury where any prolonged examination of accounts or documents or any scientific or local investigation is required, so that the case cannot, in the opinion of the Judge, conveniently be tried by a jury. This case does not come within this provision last referred to, and in cases which do not come within this provision I think the proper question, subject to the qualification hereinafter made, for the consideration of a Judge before whom a motion is made to strike out a jury notice, is as to whether or not issues of fact are raised.

This, I think, must be determined on the pleadings. When Mr. Henry, K.C., was pressed with this at the argument his answer was not that questions of fact were not raised by the pleadings, but that they were questions in regard to which there would be no fight at the trial. Assuming this to be so, then the proper course would be to amend the pleadings so that these questions of fact would not be raised. But the Court is asked to strike out the jury notice leaving the issues of fact on the record. The result of this would be that the counsel who tries the case for the defendant company can fight out each question of fact before the Judge and the plaintiff is deprived of what

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I think is his right to have these issues decided by a jury. These issues of fact are either material or they are not. If immaterial I think they should not be raised; if material the plaintiff, in my opinion, has the right to have them disposed of by a jury. I do not wish to be understood as deciding that in every case where there are issues of fact the case must necessarily be tried by a jury, because a case might arise in which the questions of fact were of such a nature that a jury was not the proper tribunal. *Balcom* v. *Hiscler*, 44 N.S.R. 287, is an example of a case not proper to be tried by a jury although questions of fact were involved. A number of issues of fact are raised by the pleadings. It does not necessarily follow that all the questions so raised will have to or ought to be put to the jury, but I think there are issues of fact to be settled before the liability or non-liability of the defendant company can be ascertained.

In my opinion, the most serious difficulty which the plaintiff has is that the Judge has, in the exercise of his discretion, decided that this case should be tried without a jury. The judgment appealed from is as follows:—

> I have come to the conclusion that this is a case that can be better tried by a Judge than by a jury. It is mainly a question of law, altogether a question of law, whether the defendant company is or is not liable. If the defendant company is liable the extent of the liability is one that a jury has no special qualification for deciding and one that it may be very inconvenient to try with a jury.

As a general rule the discretion of a Judge as to the mode of trial will not be interfered with by a Court of Appeal. It is a difficult and ungracious task to review the discretion of a Judge, but under the authorities there is no doubt that the jurisdiction to review exists, and if I come to the conclusion that the discretion has been exercised upon a wrong principle, it is, I think, my duty not to shrink from exercising the jurisdiction to review. With great reluctance and very considerable doubt I have come to the conclusion that this is a case in which the discretion of the learned Judge ought to be reviewed. Of course it is, as the learned Judge says: "altogether a question of law as to whether the defendant company "is or is not liable," but that is so in every case, without any exception.

In view of the many issues of fact which the defendant company has raised on the record and which are all open on the trial I cannot agree that "it is mainly a question of law."

When the facts are ascertained the question of law may be difficult or very simple. The learned Judge says:—

> If the defendant company is liable, the extent of the liability is one that a jury has no special qualification for deciding.

This seems to mean that when a question of damages is to be decided it is not to be inquired of by a jury unless the jury has

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some special qualification. I think this is reversing the theory that in an ordinary case in which issues of fact are raised a party is entitled *primâ facie* to a jury if he has given a jury notice. It is placing a burden on the party to shew that a jury is specially qualified. I think the law does not impose this burden.

The learned Judge in the exercise of his discretion has not found that it will be very inconvenient to try this case with a jury but only that it may be. It is true of every case that something may develop at the trial which makes the case an inconvenient one to be tried with a jury, but this in my opinion is not a ground for taking away the party's *primâ facie* right to a jury. Under the rule the Judge has power, "at the trial," to dispense with the jury if he then sees cause for doing so.

In respect of the change of venue, I think the venue should be changed to Halifax upon the terms that the defendant company transport the plaintiff and his witnesses free of charge to and from Halifax. Annapolis county is one of the chief apple growing counties of the province. On the question of obtaining sufficient and suitable cars for the shipping of apples the affidavits used on behalf of the defendant company disclose that there is a strong feeling throughout the Annapolis Valley. I can readily believe that this is so, and I think it would be difficult to get a jury in the county with no interest in the subject of obtaining a sufficient and prompt supply of cars of the quality and kind which the apple growers consider they are entitled to

Graham, E.J.

GRAHAM, E.J.:—This is an action brought under sec. 284 of the Railway Act, R.S.C. 1906, ch. 37, sec. 284, for not, according to its powers, furnishing adequate and suitable accommodation at the place of starting, or for delaying to furnish the same, for carrying apples which the plaintiff desired to ship to Winnipeg.

It appears that there was an unusually large crop of apples in the Annapolis Valley last season, and probably, as a consequence, the price for Nova Scotia apples was down in the usual market, the English market. The plaintiff at this juncture conceived the experiment of shipping the apples to the west instead—a new project in respect to Nova Scotia apples—and arranged with Laing Bros., of Winnipeg, to handle his shipments and that firm did order some apples. There were thirteen car loads sent in September and two in October. And after that there was difficulty about getting cars, and the plaintiff shipped to England, apparently, at a loss.

The great distance to Winnipeg requires time for transmission of freight and the cold sets in earlier than here apparently. And as early as October 3rd, by letter and by telegram of 17th, Laing Bros. were requiring the plaintiff to use refrigerator cars

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for shipment and to line the cars with paper and after the 10th of November to put a false floor in the car, in order to prevent the apples from freezing.

The defendant company has but a very fractional part of the haul, that is, from the Annapolis Valley to Truro, N.S., and no doubt its own supply of refrigerator cars is very limited. Beyond on the Intercolonial and the Canadian Pacific Railways, the traffic superintendent and the general freight agent of the defendants say that owing to the unexpected demand for such cars during that season the defendant company was unable to procure from its connecting lines a sufficient number of such cars to supply the demand and that there was a large number of other shippers of apples along the line in the Annapolis Valley with large quantities of apples for shipment and they were unable to obtain the desired refrigerator cars or other cars suitable for the shipment of apples which would be likely to encounter cold.

The venue was laid in the county of Annapolis and the defendant applied to change the venue to Halifax or other county not engaged in the apple business in order to get a fairer trial, or, in the alternative, to strike out the jury notice.

The learned Judge in Chambers struck out the jury notice because he thought the question involved mainly a question of law and it could be better tried by a Judge than by a jury and if the company was liable a jury had no special qualification for trying the extent of the liability.

I am very unwilling to interfere with the discretion of the learned Judge in striking out the jury notice but in this case I think *Hunt* v. *Chambers*, 20 Ch.D. 365, justifies that course.

It was not explained to me at the hearing in what way it was mainly a question of law that was involved.

It may turn out to be a question of law, viz., that no case is made out for a jury, but in the ordinary course it should be for a jury to say whether it was in the company's power to furnish these cars and whether they delayed unreasonably to furnish them and whether there was a want of care about the matter: *Strough* v. *N.Y. Central and H.R.R. Co.*, 92 App. Div. (N.Y.), 584.

It was contended, as far as I remember, that the remedy was in the first instance to go to the Board of Railway Commissioners under that section, and therefore that it was a question of law which was involved.

I think it is not too much to say that if a jury notice may be struck out in such a case it may be in every civil case. I concede that it is inconvenient to try it with a jury but that is incident to all jury trials.

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But I think in the circumstances disclosed in the affidavits that the venue should be changed to Halifax. The principal answer is the inconvenience of bringing the plaintiff's witnesses here, but terms can be imposed requiring the defendant company to transport by its railway the witnesses mentioned in the plaintiff's affidavit including the plaintiff.

I think the appeal should be allowed as to the application to strike out the jury notice, but the application as to changing the venue granted.

Meagher, J.

MEAGHER, J., read an opinion allowing the appeal and changing the venue.

Appeal allowed.

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In re O'NEILL.

British Columbia Supreme Court, Murphy, J. May 3, 1912.

1. EXTRADITION (§ I—4)—WARRANT ISSUED BY EXTRADITION COMMISSIONER—PROCEEDINGS—HABEAS CORPUS.

A warrant issued by an extradition commissioner is not open to the objection, on an application for a writ of *habeas corpus*, that he acted merely upon the complaint, without taking any evidence, where, in his reason for his judgment, he sets out the various steps taken by him since, under the statute, all that is necessary is that as a result of such proceedings, he shall be of the opinion that the warrant should issue.

2. EVIDENCE (§ IV E—411*a*)—AFFIDAVIT ESTABLISHING THE OFFENCE—THE CRIME CHARGED—DEPOSITIONS TAKEN IN A FOREIGN COUNTRY—EXTRADITION.

Under section 16 of the Extradition Act, R.S.C. 1906, ch. 155, authorizing the receiving in evidence in extradition proceedings of depositions or statements taken in a foreign state on oath, or copies of such depositions and statements and foreign certificates thereof, if duly authenticated, an affidavit tending to establish before the extradition commissioner the crime charged against a person sought to be extradited does not vitiate the extradition proceedings because such affidavit was taken by questions and answers and then written out in narrative form before being sworn to.

3. EXTRADITION (§ I—4)—WARRANT—VALIDITY—MORE THAN ONE CHARGE INCLUDED.

It is no objection to a warrant of extradition that it contains more than one charge.

4. BANKS (§ VII—152)—FRAUDULENT COMPILATION AND FILING OF RETURNS—EXTRADITABLE OFFENCE—BANK ACT, R.S.C. 1906, CH. 29, SEC. 153, SUB-SEC. 1.

The fraudulent compilation and filing of bank returns, is an extraditable offence, under sub-sec. 1 of sec. 153 of the Bank Act, R.S.C. 1906, ch. 29, making any wilful, false, or deceptive statements in such documents indictable.

5. HABEAS CORPUS (§ I C—12*b*)—EXTRADITION PROCEEDINGS—REVIEW OF ON HABEAS CORPUS—EVIDENCE JUSTIFYING THE ISSUING OF WARRANT.

It is without the province of a court to whom an application is made for writ of *habeas corpus* directing the discharge of a person extradited to a foreign country to review on such proceedings the decision of the

extradition commissioner if there is evidence justifying the issue of the warrant of extradition, the only duty of such court in that regard being to decide if any such evidence exists.

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6. EMBEZZLEMENT (§ I—7)—BANK OFFICER—MARKING NOTE "PAID" WHEN ONLY PAID IN PART—THEFT—EXTRADITION.

It is no objection to a warrant for the extradition to a foreign state of a bank officer on a charge of embezzlement of money from the bank, who caused a note endorsed by him to be marked "paid" and to be surrendered upon a part payment of the amount due thereon charging the balance to the bank's interest and discount account, which act was undoubtedly embezzlement under the law of the state to which extradition was demanded, that by sub-sec. (*b*) of sec. 359 Crim. Code, 1906, such method of getting a note from a bank was theft and not embezzlement.

[*Rex* v. *Stone* (1911), 17 Can. Crim. Cas. 377, applied.]

7. BANKS (§ VII—151)—TAKING DEPOSITS WHEN INSOLVENT—EXTRADITION OF BANK OFFICER—FOREIGN STATUTE—CRIM. CODE, 1906, SECS. 405, 405*a*.

A warrant for the extradition to a foreign state of a bank officer for receiving deposits with knowledge of the insolvency of the bank may be sustained under sec. 405, Crim. Code 1906, providing that everyone is guilty of an indictable offence who, with intent to defraud, by any false pretence, either directly or through the medium of any contract obtained by such false pretence, obtains anything capable of being stolen or procures anything capable of being stolen to be delivered to any other person than himself, and under sec. 405*a* of the Code, sec. 6 of 7 & 8 Edw. VII. (Can.) ch. 18, making everyone guilty of an indictable offence who, in incurring any debt or liability, obtains credit under false pretences, or by means of any fraud, though that part of the foreign statute pertaining to the receipt of deposits with such knowledge was amended by striking out the words: "fraudulently and with intent to cheat and defraud any person."

[*Rex* v. *Stone* (1911), 17 Can. Crim. Cas. 377, applied.]

Statement

APPLICATION for a writ of *habeas corpus* directing the discharge from custody of the accused, held under a warrant remanding him for extradition, heard at Vancouver on the 26th of April, 1912.

The application was refused.

J. W. de B. Farris, for the application.

S. S. Taylor, K.C., for accused.

Murphy, J.

MURPHY, J.:—As to the first objection, that the commissioner merely acted upon the complaint without taking any evidence, I find that in his reasons for judgment he sets out various steps taken by him, and these, I think, are all that the statute requires, as it is only necessary thereunder that as a result of such proceedings he should be of opinion that the warrant should issue. The objection is therefore overruled.

As to the evidence going to establish the alleged crimes being on affidavit only, the Act expressly authorizes such evidence to be received and makes no restriction as is contended for hereunder, and this objection is also overruled. As to this evidence having been first taken by question and answer and then written

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out in narrative form and then sworn to, which latter were the only documents produced before the commissioner, I see nothing in the Act vitiating the proceedings because of this course being adopted. Section 16 expressly authorizes statements on oath, taken as these were, to be used as evidence. This objection, therefore, also fails.

The numerous extradition cases reported in the Canadian Criminal Cases also shew that it is no objection to the warrant that it contains more than one charge, and this contention, therefore, is also overruled.

The contention that the first two charges are not extraditable because the Canadian law does not make the compiling and return of returns such as those set out punishable as fraud must also, in my opinion, fail. It is admitted that section 153 of the Bank Act makes such acts criminal. That section makes any wilfully false or deceptive statement in such reports indictable. Surely, if such statement is made fraudulently, *a fortiori* it must be made wilfully. In other words, such statement might conceivably be made wilfully and yet not fraudulently, but it could not be made fraudulently and not be wilfully made.

The commissioner has decided there is evidence justifying the warrant on the charge of embezzling $1,250, and it is not my province to review such decision. I have only to decide as to whether any such evidence exists, and I find there is ample on the record.

As to the charge of embezzling $5,837.52, the commissioner, in his judgment, justifies this by citing the evidence in regard to the transaction arising out of the joint ownership of a lot in Wallace. If the charge were in truth based on this evidence, it could, I think, hardly be contended that said evidence was not sufficient for the commissioner, in his discretion, to issue the warrant.

The charge, however, is really based on another transaction altogether, viz.: that of the satisfaction in the bank's books of the note given by the Idaho Northern Railroad Company, and indorsed by O'Neill and another, for $80,398.29. According to the evidence of Wyman, O'Neill caused this note to be marked "paid" and surrendered. The transaction was wiped off the bank books by the payment of $74,560.77 and by charging the balance of $5,837.52 to interest and discount account of the bank. In other words, if this evidence is true, O'Neill caused the bank itself to pay $5,837.52 of this note. There is no doubt such a transaction is embezzlement under the Idaho law, and I think it is theft under sub-section (*b*), section 359 of the Code. True, he did not thereby take the money in specie, but he undoubtedly reduced the assets of the bank by $5,837.52.

Acting, of course, on the assumption of the truth of this evi-

dence, I think he fraudulently and without colour of right converted this money to the use of the Idaho Northern Railway Co. and of himself and his co-indorsee.

Even if this be incorrect, he certainly—on the same assumption—stole the note, for the bank was entitled to hold it until paid in full, and this would undoubtedly bring him under said sub-section (*b*).

Whilst the charge is for embezzlement of the money, I think, under *Rex* v. *Stone* (1911), 17 Can. Crim. Cas. 377, the warrant can be supported because of his taking the note. As to the charge of embezzling the $375, if the position first above taken as to fraudulently and without colour of right converting the bank's money to the use of another—in this case, O'Neill himself—is correct, Wyman's evidence on this point supports the warrant.

As to the various counts for receiving deposits with full knowledge of the bank's insolvency, I think, under *Rex* v. *Stone*, *supra*, the warrant may be supported under 405 and 405a of the Code. The change made on the 4th of May by the Idaho Legislature, in striking out the words "fraudulently and with intent to cheat and defraud any person," is not material if these sections of our Code apply.

The judgment of the commissioner is affirmed and the prisoner remanded for extradition.

Application refused.

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SPENARD v. RUTLEDGE.

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Manitoba King's Bench. Trial before Prendergast, J. September 11, 1912.

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1. BROKERS (§ II B—12)—COMPENSATION—SUFFICIENCY OF REAL ESTATE AGENT'S SERVICES—SALE EFFECTED THROUGH ANOTHER BROKER.

Sept. 11.

A real estate broker was not entitled to any commission for the sale of certain land by the owner through another agent where it appeared that the first mentioned broker who had neither an option nor the exclusive agency for the sale of the land, his contract of agency calling upon him to "bring" a purchaser to the owner, in his efforts to sell, gave a person who had seen his advertisement of the property, full particulars thereof, but failed to keep an engagement on the next day at such person's office for the purpose of discussing the proposed deal, and such person communicated the information he had from the broker to another agent with whom he had done business for years, and who succeeded in actually bringing together the owner and the prospective purchaser with the result that the land was sold, no information being communicated to the owner by the second agent and the purchaser as to the meeting of the first agent and the purchaser or concerning what passed between the latter and the second agent, the owner remaining in entire ignorance of these transactions.

[See annotation to *Haffner* v. *Grundy*, 4 D.L.R. 531-560.]

Statement

THE plaintiff, who is a real estate agent, seeks to recover $793.75 as commission on the sale of the defendant's land to one Robert R. Gunn, under an agreement which he alleges to have

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been to the effect that the commission would be earned "in the event of the plaintiff finding and introducing a purchaser or otherwise making a sale of the property." The statement of defence is a denial of all the plaintiff's allegations.

The action was dismissed with costs.

J. W. Wilton, for plaintiff.

J. W. E. Armstrong and *E. V. Lindsay*, for defendants.

Prendergast, J.

PRENDERGAST, J.:—I will deal first—believing that the matter will be more easily cleared thereby—with those facts only in which the defendants took part or which were to their knowledge at the time.

It appears that on or about April 6th, 1911, the plaintiff and defendant Richard Albert Rutledge first met on a street car conveying them to their respective homes which are on the outskirts in the western part of the city. The plaintiff who was interesting himself particularly at the time in land in the parish of St. Charles (which is also west of the city) and knew that the defendants owned 60 acres of lot 93 in that parish enquired from Rutledge if the property was for sale. Rutledge answered at first that he was not anxious to part with the property, but eventually agreed to sell at $500 an acre, on a cash payment of $5,000 and terms to be arranged for the balance. The usual commission of 5 and 2½ per cent. was also agreed upon. The plaintiff himself says that Rutledge refused to give him an option. As to the exact nature of the services he was expected to render as agent, the plaintiff is not positive. He says he does not remember what was said word by word and whether it was that he "should interest someone or somebody," but thinks it was "if someone would buy." Rutledge, on the other hand, swears as follows: "I said not, find a purchaser. It's bring a purchaser. He was to bring a purchaser. Bring a purchaser is the words; bring or brought." This conversation seems to have been wound up by the plaintiff saying: "Very good, I will put a little ad. in the papers as well as look up clients who I think will buy."

Some three or four days later, which would be about Monday the 10th, the two again met on the street car going home, and the plaintiff shewed Rutledge an advertisement clipped from the *Free Press*, offering for sale over his (the plaintiff's) signature, sixty acres of land described as St. Charles acreage without specifying the lot. The cash payment was there rightly stated at $5,000, but as to the price per acre, Rutledge says he called the plaintiff's attention to the fact that it was there put at $500, and that the latter acknowledged the mistake and said he would have it rectified to read $500. This was not rebutted by the plaintiff. Whether this was so or not, I must say I cannot quite

clearly make out whether in the ad. contained in the issue of the *Free Press* of April 11th, filed (exhibit B) the said figures are intended for $500 or $300.

On the morning of Friday, the 14th, Rutledge who is employed in the Dominion Immigration Hall in the city was called to the 'phone by one W. J. Harper, a real estate agent, who enquired whether the property in question was for sale, and if so what were the terms including commission. The required information being given, the two agreed to meet at the Immigration Hall in the afternoon which was done. The matter was gone over again in the afternoon, the price and conditions including commission being the same as had been proposed to the plaintiff. But the plaintiff's name was not mentioned by either. Rutledge says that when Harper asked him whether anybody had an option, he replied simply that he had given none, that whoever brought him a purchaser on the terms stated would get the commission and that it made no difference to him who it was. I should say that up to this time, Harper and Rutledge were absolutely strangers to each other. Harper then said that he had a purchaser and offered a $500 cheque as deposit, to which Rutledge replied that although he could consider the matter as practically settled, still he would not close the matter without submitting it to his wife who was his co-owner, and he would let him know the following morning. On the morning following, which was Saturday the 15th, the two met again as arranged and Rutledge said his wife was willing. Harper said his purchaser was Robert R. Gunn and tendered as deposit the latter's $500 cheque which Rutledge accepted, giving in return a receipt (exhibit 5) signed by himself and his wife, and which satisfies the Statute of Frauds.

On the following Tuesday, which was the 18th, the plaintiff and Rutledge again met on the street car. This was their first meeting after the one when the plaintiff had shewn Rutledge the *Free Press* ad., and which I place as on Monday the 10th. The plaintiff asked Rutledge if it was so that he had sold the property; and, upon being informed by Rutledge that he had sold to Gunn, the plaintiff said that it was he who had given Gunn the information and so brought about the sale, and hinted before leaving something to the effect that he would consider what further action he should take in the matter.

It appears that after this, Rutledge interviewed Harper and asked him whom he had got his information from; to which the latter replied that it was from Mr. Frank Ness, secretary-treasurer of the municipality in which the land is situate. Rutledge also got on that occasion from Harper an affidavit (exhibit 7) which apparently satisfied him, but which, I must say, is in my opinion altogether meaningless, except as evidence of the deponent's care to avoid the pertinent point in the matter.

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On Tuesday the 18th, Rutledge received from the plaintiff's solicitors, a letter claiming the commission for their client.

On or about the 27th, Gunn made the cash payment, the transaction was closed by Rutledge giving a transfer and taking a mortgage back, and Harper was paid $1,500 for his commission.

As already stated, the above contains all the facts of which the defendants had knowledge at the time.

It seems to me that even at this stage and without proceeding further, it is impossible to conceive what further facts (of course unknown to the defendants) could be set up by the plaintiff which could disturb the defendants from the position as above defined, resting as it does on the grounds: 1st, that plaintiff had neither an option nor exclusive sale; 2nd, that the agreement was to bring a purchaser, and the plaintiff never even hinted to the defendants that he had found one; and 3rd, that when closing the sale to Gunn and agreeing to pay Harper a commission, the defendants did not have the faintest suspicion that the plaintiff had ever had any direct or indirect relation with this purchaser.

But what further facts does the plaintiff rely on?

The evidence shews that on Thursday the 13th, Robert R. Gunn, who was familiar with values in St. Charles, upon seeing the plaintiff's advertisement offering some of that property at the abnormally low figure of $300 an acre, called up the plaintiff by 'phone, and, as he was not in, left his own name and number. The plaintiff swears that on coming back to his office that same day, he rang up the number left by Robert R. Gunn and that somebody whom he took to be that person came to the 'phone and asked for particulars of the property, which particulars he (the plaintiff) then gave fully, including the name and 'phone number of Richard Alfred Rutledge as purchaser, so, as he says, that he could personally communicate with him at once about the deferred payments, and adding that he would be in his office in a few moments.

The plaintiff swears that a few minutes later, he met Robert R. Gunn in the latter's office, and that after going again over the terms, Gunn said: "Will you come in my office to-morrow morning? I think I'll make a deal with you."

The plaintiff says that the next day, Friday the 14th, was so blizzardy that he stayed home, believing that Gunn would not be willing to go and inspect the property with him in such weather; and that on Saturday the 15th, having called on Gunn at the latter's office and explained why he had not come the previous day, Gunn replied that he did not require him any more and had nothing to say to him, and otherwise intimated that all overtures were at an end. Three days later, as already stated, which was on Tuesday the 18th, the plaintiff, who had in the

meantime heard of the sale, met Rutledge in the street car and the latter replied to his enquiry that he had in fact sold to Gunn. I should add that it is also established that it was Gunn who first called Harper's attention to this property, and that this was on the 13th.

The material point in the above version of the plaintiff is of course that on Thursday the 14th, he both by 'phone and personally gave Gunn the terms of sale as well as the name of Rutledge as vendor. His contention is then that having given on the 13th this information to Gunn who communicated it the same day to Harper, and the latter having on the 14th approached Rutledge for the first time and then practically closed the sale, he (the plaintiff) is the one who must be held to have found Gunn as a purchaser and to have brought him to Rutledge although through an intermediary, and that this entitles him to his commission.

If it be assumed that the above version of the plaintiff is correct, the conclusion must then force itself that he was imposed upon and unfairly made to part with valuable information which was the result of his labour, with the object that others should reap the benefit of the same. And I will say, without localizing or apportioning any responsibility that I have no doubt, on the whole of the evidence that the plaintiff was so imposed upon.

This, however, does not help the plaintiff in this issue; for no participation in or knowledge of the relations between the plaintiff and Gunn or of what passed between Gunn and Harper was brought home to Rutledge, who is shewn on the contrary to have greeted Harper as an independent and up to that time an unknown real estate agent, bringing him a purchaser also unknown to him up to that moment. The fact remains then that the plaintiff did not bring the purchaser to the defendants as the condition was. He undoubtedly was one of the causes and a most material cause of the sale, but the defendants were not aware of that. He was not the *causa causans* or efficient cause of the sale. Under the well-known authorities, *Stratton* v. *Vachon*, 44 Can. S.C.R. 395, is clearly distinguishable from this issue. For in that case, the question as to who secured the purchaser was one of implication; while here, the question is directly determined by the fact of Harper having actually brought Gunn and Rutledge together.

The plaintiff has, however, another difficulty to contend with. It is this, that he has called Gunn as his witness and Gunn flatly contradicts him on what I have already referred to as the most material point of his testimony. Gunn swears that after ringing up the plaintiff when he was not there on Thursday the 13th, he did not see him at all or communicate with him in any way whatsoever till Saturday the 15th. Gunn says that was the first

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time he ever met or in any way communicated with the plaintiff in his life. He denies that on the 13th he and the plaintiff spoke over the 'phone as well as that the latter saw him in his office a few minutes later. This would mean, of course, that when Harper entered into negotiations with Rutledge on the 14th, he could not have been acting on information which Gunn had received from the plaintiff, as it was only the following day that the two latter communicated together for the first time in their lives.

Gunn and Harper explained in this way how they got the information—Gunn says that being struck by the abnormally low price of $300 asked for St. Charles acreage in the plaintiff's advertisement he called up the latter on the 13th but was told he was not in. He says he 'phoned the same day to Harper calling his attention to the advertisement and telling him to look up what acreage there might be in St. Charles of which they did know and which might be had for $300. It is explained that the two had been associated for years, had bought and sold property together, and divided commissions on sales as the understanding was that they should do in this one. Harper says that the next day, Friday, he went and enquired from Mr. Ness, secretary-treasurer of the municipality to which the land belongs, who the owner of lot 93 was, and that he was told it was Mr. Rutledge who lived in those parts but that he had left in the morning for the Immigration Hall in the city. On the same day, as above stated, Harper having come back to the city first 'phoned to and a few minutes later met Rutledge at the hall and opened negotiations with him having in the meantime imparted his information to Gunn who then decided to buy and gave him his $500 cheque to be used as a deposit.

Perhaps it would be a matter of interest to explain how it is that, upon arriving at Mr. Ness's office, Harper enquired at once about lot 93 specifically? Of course, he knew of the advertisement; but the advertisement did not specify any lot. Does this not shew some possibility after all, that Harper may have had that information from Gunn and Gunn may have had it from the plaintiff as the latter asserts? But, whatever may be the implication from this fact alone, it cannot avail the plaintiff against the testimony of Gunn whom unfortunately for him, the circumstances of his case required that he should call as a witness on his own behalf.

I should add that of the $1,500 commission which he received Harper gave Gunn $600 and retained $900 for himself,—which is a feature of the case not at all likely to ruffle the placidity of the conviction I have already expressed that the plaintiff, somewhere, somehow and by someone or other was taken advantage

of. But, as I have also stated, nothing of that has been brought to the defendants' door, and the plaintiff cannot recover for services merely consisting of this, that the attention of another agent who made the sale was first called to the property by his (the plaintiff's) advertisement, which after all, is the most that the latter had been able to shew.

I must dismiss the action with costs.

Action dismissed.

YOUNG v. CARTER.

Ontario High Court. Trial before Boyd, C. June 24, 1912.

1. CIVIL RIGHTS (§ I—10)—EFFECT OF CONVICTION ON VALIDITY OF ANY TRANSACTION IN RESPECT TO CONVICT'S GOODS AND LANDS—CRIM. CODE 1906, SEC. 1033.

Under sec. 1033, Crim. Code 1906, providing that no conviction or judgment for any treason or indictable offence shall cause any attainder or corruption of blood or any forfeiture or escheat, a convicted offender serving his term may deal with his goods and lands as other men who are free from custody may deal with theirs.

2. ATTAINDER (§ I—5)—EFFECT OF CONVICTION ON CONVICT'S RIGHT TO RENEW A LEASE—CRIM. CODE 1906, SEC. 1033.

Under sec. 1033 Crim. Code 1906, providing that no conviction or judgment for any treason or indictable offence shall cause any attainder or corruption of blood or any forfeiture or escheat, a renewal of a prior lease of hotel premises will not be set aside merely because it was made by a convict while serving his term in a penitentiary.

3. CONSTITUTIONAL LAW (§ I A 1—2)—ADOPTION BY CANADA OF IMPERIAL ACTS—THE FORFEITURE ACT, 33 & 34 VICT. CH. 23 (IMP.).

The Forfeiture Act, 33 & 34 Vict. ch. 23 (Imp.), is not in force in Canada.

[*Dumphy* v. *Kehoe*, 21 Rev. Leg. 119, Jetté, J., pp. 126, 127, followed.]

Statement

ACTION to set aside a lease of hotel premises made by the plaintiff to the defendants for three years from the 1st May, 1910, in renewal of a former lease.

The renewal lease was executed by the plaintiff on the 15th August, 1910, while he was serving a term of imprisonment in a penitentiary. He was released on parol in January, 1911; and the action was begun in April of that year.

The action was dismissed.

G. S. Bowie and *F. Hugh Keefer*, for the plaintiff.

A. D. George, for the defendants.

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June 24, 1912. BOYD, C.:—The plaintiff seeks to undo the renewal of a lease of hotel premises made by him to the defendants for three years from the 1st May, 1910. The renewal of the prior lease between the same parties was dated the 7th April, and was executed by the plaintiff on the 15th August, 1910, while he was serving a term of imprisonment in the penitentiary at Stony Mountain, Manitoba. The nature of his offence is not disclosed

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in the plaintiff's evidence; but I am told that it was perjury. He was released on parol in January, 1911; and this action was brought in April of that year.

No case was made out at the trial for relief on the ground of the plaintiff being overborne by threats or pressure so that he was coerced into signing the document. There was a mortgage upon the property, and foreclosure was threatened if the interest was not paid, and there was no way of paying the interest except out of the rents, and the tenants would not pay unless they obtained a renewal for three years at the same rent, and the liquor license for the year was about expiring and needed to be looked after if the hotel was to retain its chief value. All this combination of circumstances was considered by the plaintiff, and he found that (handicapped as he was under corporal confinement) the best thing to be done was to accept the proposition of the tenants. He was told by letter of their solicitor that, if he did not wish to sign, he must return the proposed renewal which they had tendered; upon which he added a clause to the document and signed it and sent it back so executed. Evidence was also given that the rent was, all circumstances considered, a fair rent; and, though more is now offered, that is probably the result of improved conditions and prospects in Fort Frances, where the hotel is situate.

I reserved judgment upon a ground of defence which sounded like an anachronism. The plaintiff pleaded that, being a convict undergoing sentence, he was, at the date of execution, incompetent to contract, and for this reason asks to have the renewal lease declared null and void. His term of imprisonment was for two years from November, 1909, and would have expired in November, 1911, but he was released (as already said) on parol early in that year. He was, no doubt, in actual custody and incarcerated at the time he signed; but did this incapacitate him from dealing with his property?

It is not necessary to deal with the old-time distinctions between attainder and forfeiture, the one pertaining to high treason and capital offences, and the latter to felonies of a less flagrant character. Felony generically meant a crime to be punished by forfeiture of lands and goods, to which death was generally superadded. But this method of punishment by depriving the convicted offender of lands and goods has been distinctly put an end to by the Canadian Code, and the property is left to the convict unaffected by any restrictive provisions. This amendment of the criminal law is in pursuance of the general plan of simplifying its provisions and of abolishing distinctions of obsolete and embarrassing character, which may well be displaced by the more humane policy of modern civilization.

The present English law is cited for the plaintiff; but it has really no direct application to the state of affairs in Canada.

By the Forfeiture Act of 1870, 33 & 34 Vict. ch. 23 (Imp.), it was provided that no conviction or judgment of or for any treason or felony should cause any attainder or corruption of blood or any forfeiture or escheat (sec. 1); and then it provided for the appointment by the Crown of an administrator of a convict's property; and it also declared that every convict should be incapable (during his servitude) of alienating or charging his property or of making any contract (sec. 8). But, even as to this Act, the effect is said to be that it leaves a convict for felony in possession of his property, just as the common law left a convict for misdemeanour in possession of his property: Lush, L.J., in *Ex p. Graves* (1881), 19 Ch.D. 1, at p. 5.

Our legislators have had an eye on the English statute, for they have adopted the remedial provisions of sec. 1 into our Criminal Code, where it appears as sec. 1033 (R.S.C. 1906, ch. 146), where almost the identical language is used, viz., that no conviction or judgment for any treason or indictable offence shall cause any attainder or corruption of blood or any forfeiture or escheat. The variation from the word "felony" in the English Act to the phrase "indictable offence" in the Code, is because of sec. 14 of the Canadian Code, whereby the distinction between felony and misdemeanour is abolished, and all are treated as indictable offences. The grade of crime is with us determined by the gravity of the offence and the degree of punishment attached.

The effect of this section of the Code is equivalent to that of the English Act, leaving undisturbed in the possession of the convict all his property. The law in Canada has not gone further, as has been done in England, so as to interpose certain obstacles on the action of the convict with respect to his property and to vest the administration thereof in a statutory official. A convicted offender serving his term may deal with his goods and lands as other men who are free from custody may deal with theirs; and no disability or restraint is put upon the convict, so far as dealing with his property is concerned, beyond that which attaches to other owners.

I find that the point has been expressly decided by Mr. Justice Jetté in *Dumphy* v. *Kehoe* (1891), 21 Rev. Leg. 119, that the Imperial statute relied upon by the plaintiff, 33 & 34 Vict. ch. 23, is not in force in Canada: pp. 126, 127. The other aspects of his decision have been superseded by the repeal of the clauses of the R.S.C. 1886, ch. 181, secs. 36 and 37, by sec. 981 of the Criminal Code, 1892.

The result is, that the plaintiff's action fails in all respects and must be dismissed with costs.

Action dismissed.

B. C.

S. C.

1912

Sept. 3.

PARSHLEY v. HANSON.

British Columbia Supreme Court, Murphy, J. September 3, 1912.

1. COURTS (§ I B—17)—JURISDICTION OVER TRANSITORY ACTIONS—SERVICE OF WRIT ON DEFENDANT WHILE IN BRITISH COLUMBIA.

Where, in an action in its nature transitory, a writ is issued and served upon the defendant whilst he is within the territorial jurisdiction of the Supreme Court of British Columbia, that court has jurisdiction over the action.

[*Jackson* v. *Spittall*, L.R. 5 C.P. 542, followed.]

Statement

THIS is an application by the defendant to set aside the service of a writ.

The application was dismissed with costs.

Walsh & McKim, for plaintiff.
Mellish, for defendant.

Murphy, J.

MURPHY, J.:—The law as applicable to the facts of this case is thus laid down in *Jackson* v. *Spittall* (1870), L.R. 5 C.P. 542:—

> Though every fact arose abroad and the dispute was between foreigners yet the Courts we apprehend would clearly entertain and determine the cause if in its nature transitory and if the process of the Court had been brought to bear against the defendant by service of a writ on him where present in England.

Transitory actions were those in which the venue might be laid in any county (Wharton's Law Lexicon) that is, those in which the facts involved might have occurred anywhere as opposed to local actions, viz.: those the facts of which necessarily involved the idea of a certain place or part of the soil (Foote's International Law, 3rd ed., p. 343). The alleged cause of action here is clearly transitory, the defendant was personally served in B. C. and consequently the Court has jurisdiction.

As to the objection that the matter does not fall within sec. 9 of the Supreme Court Act, [R.S.B.C. 1911, ch. 58, sec. 9] the reply is that it does. That section gives the Court jurisdiction in all cases civil as well as criminal within the province.

British Columbia by statute adopted the laws of England as the same existed on the 19th day of November, 1858, unless locally inapplicable.

By the law of England as above set out a case arises over which the Courts have jurisdiction when a person liable to a transitory action is actually served with a writ whilst within the territorial jurisdiction of such Courts.

The application is dismissed with costs to the plaintiff in any event.

Application dismissed.

CITY OF TORONTO v. WILLIAMS.

ONT.

H. C. J.
1912

Aug. 7.

Ontario High Court, Britton, J. August 7, 1912.

1. BUILDINGS (§ I A—9*a*)—MUNICIPAL REGULATIONS—LOCATION OF APARTMENT HOUSES—WHAT CONSTITUTES LOCATION—MUNICIPAL ACT (ONT.) 1903, SEC. 541*a*, AS AMENDED BY 2 GEO. V. CH. 40, SEC. 10.

The purchase of a lot for the purpose of erecting an apartment house thereon, the obtaining from the municipality of a permit for the work and of a water service, and the performance of some work on the apartment house, although not rapidly proceeded with, where there is nothing to indicate bad faith on the part of the owner, constitute a "location" of the apartment house, within the meaning of section 541*a*, clause (e) of the Ontario Municipal Act, 1903, as enacted by 2 Geo. V. (Ont.) ch. 40, sec. 10, and a consent by the municipality to such location.

2. MUNICIPAL CORPORATIONS (§ II C 3—67)—PROHIBITION BY BY-LAW OF THE ERECTION OF AN APARTMENT HOUSE OR GARAGE ALREADY LOCATED.

Clause (c) of section 541*a* of the Ontario Municipal Act, 1903, as enacted by 2 Geo. V. (Ont.) ch. 40, sec. 10, does not authorize the prohibition by by-law of an apartment or tenement house or garage which has already been located.

[*City of Toronto* v. *Wheeler*, 4 D.L.R. 352, 3 O.W.N. 1424, referred to.]

3. MUNICIPAL CORPORATIONS (§ II C 3—66)—ABSENCE OF JURISDICTION—REVOCATION OF A PERMIT ALREADY GIVEN—RETROACTIVE EFFECT OF BY-LAW—2 GEO. V. (ONT.) CH. 40, SEC. 10.

The city of Toronto has no power under section 6 of its building by-law, No. 4861, to revoke a permit already given, on the ground that the erection of the building in question is an infringement of a by-law passed under the authority of clause (c) of section 541*a* of the Ontario Municipal Act, 1903, as enacted by 2 Geo. V. (Ont.) ch. 40, sec. 10.

Statement

MOTION by the plaintiffs to continue an interim injunction restraining the defendant from erecting an apartment house upon her lot on Brunswick avenue. By consent of counsel, the motion was turned into a motion for judgment.

Judgment was given dismissing the action.

Irving S. Fairty, for the plaintiffs.

G. C. Campbell, for the defendant.

Britton, J.

BRITTON, J.:—The defendant purchased the land upon Brunswick avenue in May, 1911. In an affidavit of the father of the defendant it is stated, and I have no doubt of the truth of the statement, that this lot was purchased by the defendant for the purpose of erecting an apartment house thereon.

Shortly after the purchase, proceedings were taken for expropriating part of that lot, having in view the straightening of Brunswick avenue and enlarging Kendall square. The defendant naturally halted as to then going on with the contemplated building. Subsequently, the project or proposal, as to Brunswick avenue, was not gone on with; and the defendant then proposed to proceed with her apartment house.

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In the latter part of 1911, the defendant applied to the city Architect and Superintendent of Building for permission to build, and submitted plans and specifications. The City Architect and Superintendent of Building knew that these plans and specifications were those of an apartment house; and on the 31st January, 1912, permission was granted to the defendant, in terms, "to erect a two-storey brick *apartment*, near Wells street, on Brunswick avenue, in Limit B., in accordance with plans and specifications approved by this department."

Water service was applied for, and granted by the plaintiffs, and paid for by the defendant.

The work has not been rapidly proceeded with, but some work has been done; and there is nothing before me to indicate bad faith on the part of the defendant.

On the 16th day of April, 1912, an amendment to the Municipal Act was made (2 Geo. V. ch. 40, sec. 10), by which the following clause was added as clause (*c*) to sec. 541a of the Municipal Act, 1903, as enacted by sec. 19 of the Municipal Amendment Act, 1904: "In the case of cities having a population of not less than 100,000, to prohibit, regulate, and control the location on certain streets to be named in the by-law of apartment or tenement houses and garages to be used for hire or gain."

The plaintiffs contend that there has been no location of this contemplated apartment house; and so it can, under the recent amendment, be prohibited.

I am of opinion that what was done amounts to a "locating" of this house and a consent by the plaintiffs to its location.

The plaintiffs have assumed to revoke the permission given; and they say that power is given to do so by sec. 6 of the city building by-law, No. 4861. The alleged attempt at revocation was not for any of the causes mentioned in sec. 6.

The case, as presented to me, seems quite like *City of Toronto* v. *Wheeler*, 4 D.L.R. 352, 3 O.W.N. 1424. I agree with the decision and reasons for decision given by Mr. Justice Middleton. It would be manifestly unfair to the defendant—it would be rank injustice to her—after granting the permit, which, in my opinion, amounts to location, within the meaning of the statute, to step in now and stop the work, leaving upon her hands the lot she bought, the plans and estimates prepared, and the work, much or little, already done—of no value to her other than for the house she desires to erect.

The action will be dismissed with costs.

Action dismissed.

G. M. **ANNABLE** (defendant, appellant) v. James H. **COVENTRY** (plaintiff, respondent).

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S. C.
1912
June 4.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. June 4, 1912.

1. CANCELLATION OF INSTRUMENTS (§ I—5)—CANCELLATION OF TRANSFER AND CERTIFICATE OF TITLE OBTAINED BY FRAUD.

A transfer of land and a certificate of title issued to the grantee therein upon the registration thereof by him will be cancelled because of his fraud in obtaining them, where it appeared that the devisee under his father's will of the land transferred which was the south quarter of a certain section of land homesteaded by the testator, upon his completion of the homestead duties in respect thereto, received a certificate of recommendation that a patent issue to him and thereafter he entered into a contract to sell the land and in accordance therewith made an assignment of the land to the purchaser, which could not be registered then because no patent for the land had been issued, it being issued nearly ten years after such sale to his mother, the executrix under the will, and it was registered in the land titles office, and where it also appeared that the devisee aforesaid sold, two months before the issue of the patent, the north-west quarter of the same section, of which he was also devisee under the same will, and the grantee in the transfer of that section found six years after such sale to him in a solicitor's office, a transfer of the south-west quarter mistakenly executed by the executrix aforesaid, which transfer, without paying consideration therefor, the purchaser of the north-west quarter fraudulently removed and had registered in the land titles office, getting thereby a certificate of title to the quarter section therein described.

Statement.

APPEAL by the defendant, heard 13th May, 1912, from the judgment of the Supreme Court of Saskatchewan in *Coventry* v. *Annable*, 19 W.L.R. 400, which was an action brought to declare that the defendant held certain land in trust for the plaintiff whereby the decision of Newlands, J., at the trial, *Coventry* v. *Annable*, 4 Sask. L.R. 175, declaring the transfer to the defendant to be a voluntary one for the plaintiff, was varied by directing a cancellation of such transfer.

The Supreme Court of Canada dismissed the appeal.

G. E. Taylor, for the appellant.
W. B. Willoughby, for the respondent.

Fitzpatrick, C.J.

THE CHIEF JUSTICE (SIR CHARLES FITZPATRICK) agreed that the appeal should be dismissed with costs.

Davies, J.

DAVIES, J.:—I am not able to reach the charitable conclusion of the trial Judge that there was no fraud on the part of Annable in taking from the vault of the solicitor Grayson and from that solicitor's clerk in his master's absence the transfer of the south-west quarter of section 36, township 15, range 25 west of the second meridian, and in causing the same to be registered and a certificate of title taken out to himself.

The learned trial Judge, however, finds that under the circumstances, the onus of proof lay upon him to prove that he paid value for the land and that he failed to discharge that onus.

I have gone carefully through the evidence, and, while I

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fully agree in the finding that Annable did not prove that he gave any value for the land, I think also that he must have known when he obtained from the vault of the solicitor, Grayson, the transfer, found by the latter's clerk in a private bundle of his employer's, from Kitty Ann White to Annable of this quarter section, that it had been executed in mistake for the north-west quarter section of the same section which he had actually purchased from William J. White.

He must have known of the mistake when he registered the transfer and took out the certificate of title in his own name.

The positive evidence of William J. White that he never sold this south-west quarter section to Annable but did sell him the north-west quarter section; the failure of Annable to remember how much he paid for this south-west quarter section, which he alleged he bought, or the amount of any of the instalments he paid, or when he paid any of them; the absence of any receipt, agreement or scrap of writing evidencing a sale to Annable by White or a payment of any part of the purchase money to White; the absence of any entry in any book shewing any such payment, together with other facts proved, convince me that White never did sell and Annable never did buy this south-west quarter section.

William J. White was the beneficial owner of the land, it having been willed to him by his father. In April, 1902, he sold and transferred the quarter section to the respondent, Coventry, and was paid by him the purchase price. Coventry went into possession at or immediately after his purchase and has remained in possession, farming the land and otherwise dealing with it as owner ever since, without any claim ever having been made by Annable that the land was his until after he found the assignment in Grayson's vault to himself and registered it in 1909.

Kitty White was the executrix of the will of her late husband, Charles B. White. The latter's son, William J., was the beneficial owner and devisee under his father's will. The consideration stated in the transfer found in the vault from Kitty White, executrix, to Annable, was $1.00.

Whatever may have been the belief or intention of Annable when he induced Grayson's clerk to give him this transfer we do not know, but, looking at all the facts proved, I fully agree with Chief Justice Wetmore, that with full knowledge of the facts that W. J. White had sold this quarter section to Coventry, the respondent, and that he was the owner of the land the appellant fraudulently caused the transfer to himself from Kitty White to be registered and so obtained the certificate of title.

I think we are fully justified in reversing the inference of the absence of fraud drawn from the facts by the trial Judge.

I would dismiss the appeal with costs.

IDINGTON, J.:—The father of William J. White homesteaded the south-west quarter of section 36, township 15, range 24, west of the second meridian and in the Province of Saskatchewan and had the right of pre-emption to the north-west quarter of said section.

He died on the 7th of March, 1891, at his original home in Ontario, after having by his will devised said lands to his son. By the same will he devised to his wife his homestead in Ontario and bequeathed to her his chattels there, during widowhood, and appointed her his executrix of the said will, which she proved.

William J. White lived on and completed the homestead duties in respect of said south-west quarter section and got a certificate recommending him to the grant thereof.

As there were no unpaid debts she was, in effect, a bare trustee for her son William J. White. He, being the actual beneficial owner of the said half-section, resided on and farmed the said south-west quarter section for some years, if not till he sold it for a valuable consideration to the respondent, and, on the 26th of April, 1902, made an assignment to him pursuant to said sale. Unfortunately this could not, by law, be registered until the Crown patent issued, and even then was not tendered for registration, or the need for a transfer from the executrix would have been discovered and, no doubt, got.

In conformity with the Land Titles Act she was, on the 11th of May, 1903, granted said lands as personal representative, and this was registered on the 31st of March, 1904.

But it seems undisputed that respondent, who resided near it, ever since had possessed and cultivated the land till these proceedings, and, meantime, had made an abortive sale of it.

William J. White had, as appears from the abstract of registrations, previously mortgaged the property to local bankers for a small sum. And on the 28th of the said April, 1902, that was discharged. A small seed-wheat-loan bond, as I take it, was made by William J. White in favour of the Minister of the Interior on the 12th of June, 1903. I see no explanation of why he should have signed for that after his sale to the respondent. As he stood in the Department of the Interior certified as stated for the patent, I infer he was merely carrying out his agreement of the previous year. Curiously enough the patent to his mother as personal representative and this bond bear the same number on the abstract. However, as no point is made of the execution of this bond save the unimportant one to shew that William J. White was not correct in saying he had left and never came back to Moose Jaw after January, 1903, it does not concern us much.

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The appellant says he bought the north-west or pre-emption quarter section and this south-west quarter section from William J. White as one entire purchase, for the same consideration covering both. This single transaction becomes, as will presently appear, in carrying it out, if the story is true, strangely, and in an unaccountable manner, divided into two.

The said north-west quarter section was transferred to him by William J. White for the alleged consideration of $800, by a transfer, dated the 10th of March, 1903, drawn by one Fish, a local conveyancer.

There is produced and proved an assignment of this north-west quarter of said section from Kitty Ann White to William J. White, dated 14th September, 1904, for the consideration of one dollar.

Seeing the patent only got registered in the previous month of March this clearly is attributable to the completion of the title William J. White had bargained with the appellant to give him and pursuant to which he had made said transfer of the 10th of March, 1903, referred to.

The appellant had lived in Moose Jaw twenty-eight years before the trial and had been rancher, real estate agent and real estate speculator, and knew the district where the south-west quarter section now in question is situate, about twenty miles from Moose Jaw. On the 18th of March, 1909, he registered a transfer from Kitty Ann White, described as widow and personal representative of her late husband, purporting to transfer to him said south-west quarter section for the consideration of one dollar, and bearing date the 20th of July, 1903, and got, thereupon, a certificate of title which he contends is conclusive against the world.

At the foot of this certificate is noted, by the assistant deputy-registrar, the fact that the title of the owner is subject to the above-mentioned bond to the Minister of the Interior.

The attesting witness to said transfer was on said date serving as a clerk in the office of a solicitor where the respondent's above-mentioned transfer from White had been drawn, executed and still remained awaiting registration, which could not take place till registration of the patent. He made at the time the usual affidavit of execution from which it appears that this assignment was executed at Moose Jaw on the day it bears date. This witness was called but can give no information beyond verifying the fact of his being attesting witness and that the document seemed to have been written by a typewriting machine he had operated, but whether on this occasion he or some one else used it he cannot say.

The solicitor's mind is equally a blank on the subject, save that he knew this south-west quarter section had been previously

to that date conveyed by William J. White to the respondent and that he must have overlooked the mis-description.

It had remained, evidently, for nearly six years after this appellant had got Fish to draw the transfer from William J. White to him of the north-west quarter section, and four or five years after he had carried it to the solicitor to get that said transfer by Mrs. White, of September following, to complete the business.

The appellant, on the 25th of February, 1909, having sold the north-west quarter section to Wilson and Schrader, they retained said solicitor to pass the title. He accompanied the solicitor's clerk who had then waited on him for his title papers to the solicitor's office to search for them. Whilst engaged in such search, the appellant, for the first time, saw the above-mentioned assignment of the south-west quarter section from Kitty Ann White to him and induced the clerk thoughtlessly to give it up to him. He took it away without asking the solicitor and registered it as already stated on the 18th of March, 1909.

If he had, as was his duty, asked the solicitor he never would have got it for the solicitor tells us he knew Coventry, the respondent, had bought the south-west quarter section from William J. White.

Though he says he had bought both quarter sections at the time from William J. White as parts of the same transaction for one and the same consideration he cannot tell what that was. He pretends White owed him something, which the latter denies. He says the son directed the balance, which he cannot name except what had to be paid to the Government for the north-west quarter, to be paid to his mother and it was paid accordingly by monthly instalments, but of which he can name no amount nor specify the times of payment.

She was dead before he ventured, without asking the solicitor, and hence improperly, to take possession of the document he founds his title upon, and was thereby led to invent this story he now tells. He cannot remember that he ever told any one till then that he owned or had bought the south-west quarter. It is shewn Mrs. White was well acquainted and on friendly terms with Coventry who, on coming to town usually made a friendly call on her. She had bought a house in Moose Jaw after coming to town to live, and lived in it there with her son. There is not a shadow of foundation for supposing she was likely to be a party to a fraud on respondent, as she must have been if knowingly signing a transfer thereof to another and in monthly receipt of instalments on account of the price thereof.

The solicitor, out of whose office the assignment was improperly taken, acted for respondent and had, as he supposed, passed the title by procuring the discharge of the mortgage to the local

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bankers, but never saw the will, and, I infer, waited the issue of the patent for which William J. White had a certificate apparently entitling him thereto. I infer that, as the transfer could not be registered before patent, whoever got it, the solicitor awaiting it lost sight of the transaction and the registration of the assignment to respondent was thus overlooked. The solicitor, I may repeat, has no doubt of the fact that respondent was the purchaser of the south-west quarter section and entitled to it.

And although the appellant swears the transaction was a single one embracing the purchase of a half-section, he has utterly failed to suggest how or for what reason the assignments he got from William J. White, and his mother, and he knew of all along, and had ultimately registered, one or both contained only the conveyance of a quarter section instead of the half section he was entitled to if his story is true. He listed the north-west quarter for sale but refrained from listing the south-west quarter. He never paid taxes on the latter. He does not venture to say he omitted to do so as to the north-west quarter. He, I think, must have known in many ways that respondent was in possession of and claiming the south-west quarter section as the vendee of William J. White. The latter swears he had told him so. I see no reason to discredit him. Appellant undoubtedly knew it was a homestead quarter section, with such improvements as that implies, yet never concerned himself to know anything of the utility of these improvements with a view to benefiting therefrom as entitled on his story.

He seems to admit driving past it, yet never noticed or troubled to notice their state or other state of his acquisition which he never had seen except in this way.

He told respondent he had bought the north-west quarter from William J. White, but never set up any claim to the south-west quarter. The respondent also swears to the appellant telling him of having sold his quarter and having previously wanted one Smiley to put respondent's quarter along with his and sell both as a half section.

The appellant denies remembering. His explanation admits that he knew respondent had a quarter of that section but imagined it was another. For a real estate speculator conversant with the district all this seems lame. And his story as to the alleged payments without receipts or other corroboration of any kind seems to me untrustworthy. The alleged loss of account books might, one would have supposed, be capable of corroboration, especially for one having a book-keeper. It would have been interesting to have had the book-keeper produce and verify the earliest cash-book and other books still on hand.

And when we find the book-keeper writing a letter clearly disclosing knowledge of the respondent's claim and that man not called, one is apt to become suspicious.

The question of notice may in itself be covered by the Land Titles Act, but that does not dispense with its use as a valuable part of the evidence in a case of fraud. He swears he was to pay $800 to the Government for the north-west quarter. It is admitted the Government price actually was only $400, and with interest, which from the date of the homesteading would be about $260, could not be the sum he names. There would be thus left a small balance. White swears he was to have got a hundred dollars but never got it.

When we find $800 put in the assignment as the consideration, and that both almost agree, the one positive and the other suggesting that the bargain was made on the street, and it was found later that Mrs. White had to sign a transfer, I see nothing improbable in the surmise that I am tempted to make of something being said now forgotten by White to paying this balance to her.

It is not the version of either, yet they were speaking so long after the transaction was closed they may have forgotten such details. I need not dwell on, and do not rest on this surmise. If it comes to a question of veracity between them I have no hesitation in accepting White's statement as against that of appellant. The former coincides with honest dealing and a straight method of business. The latter is the converse and implies by its methods most improbable things.

No one has accepted the latter's story. Nor do I see how any one accustomed to such work can peruse his evidence and trust it.

The claims he sets up must rest on a bargain with William J. White, and the assignment put forward as executed by his mother must be taken, if anything, as a mere mode of carrying that out.

When I come to the conclusion, as I do unhesitatingly, that there never was a bargain with him that embraced this south-west quarter, then his act of inducing a clerk, without authority and behind his master's back, to deliver over such a document under all the circumstances I have related, and of having it taken to the registry and put on record there, constitutes such a gross fraud that there should, I respectfully submit, never have been any hesitation in so declaring.

If White ever thought of selling and defeating respondent's rights he clearly must have contemplated fraud, and it would require but little evidence to make the appellant a party who had participated therein with him under section 65 of the Act. If a personal representative, shewn to be such, on the face of the

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certificate and registry as here, should, for his or her own purposes, intending to apply the purchase money to his or her own use, as to receive it for such purpose to the knowledge of the purchaser, how can he not be held participating or colluding?

If White's story be accepted, how could the payments to the trustee be properly made?

Clear as noonday, either White or appellant intended deliberately to cheat somebody out of their rights in the south-west quarter, for I am quite sure that the late Mrs. White never so intended. And there is nothing but appellant's word for it that White did. As between the two I have no doubt in concluding it was appellant who committed fraud, and all that has followed, placing him in the light of either knave or fool, as his own story does, is the result thereof.

We have no explanation of how the transfer of the north-west quarter from White to appellant got from Fish's office to that of the solicitor, or for what purpose. Possibly the appellant might have helped by searches most men would have made in an effort to discover this and other details of a story involving their honour, especially knowing or having means of knowing William J. White's version given in Moose Jaw six weeks before the trial. No one else seems to know the how or why of this and many other strange things his story suggests.

I think, however, a careful consideration of the evidence as he chooses to leave it as it stands almost demonstrates that the instrument he used was simply the product of a typewriter's mistake of "south-west" for "north-west," and its destruction was quite overlooked when about a year and three months later the late Mrs. White rectified the error by executing a new transfer.

Having reached such conclusions I need not enter at length, if at all, upon the questions raised by the learned trial Judge's view of the Act, and the possibility of his judgment being maintained on the ground and in the way he dealt with the case. I do not dissent therefrom but express no definite opinion in that regard.

I may call attention to the following section of the Land Titles Act:—

> Section 4. Nothing contained in this Act shall take away or affect the jurisdiction of any competent Court on the ground of actual fraud or over contracts for the sale or other disposition of land for which a certificate of title has been granted. (1906, ch. 24, sec. 4.)

This does not seem to me so clearly limited to the construction contended for by appellant's counsel and which he seemed to urge. To restrict it to the cases of fraud only would eliminate part of the section. To apply that part of the section "or over contracts for the sale or other disposition of land" to such con-

tracts as made after every certificate of title would be needless. Such a jurisdiction is nowhere in the Act taken away, and must, unless expressly taken away, be presumed to continue.

If, on the proper construction, it is applicable to a case such as this, for example, where the contract has not been fulfilled and yet the certificate of title which the parties might intend to become effective when once due fulfilment of contract for sale had taken place, had been improvidently issued, then the form of relief the learned trial Judge gave might be appropriate so long as no right of third parties had intervened. There are many considerations relative thereto suggested by other sections of the Act.

The question was argued somewhat but I have formed, I repeat, no final opinion in regard thereto.

The question is raised of the land not having been brought under the Act by registration of the Crown grant at the time when these competing transfers were made, but I doubt the point being well taken if nothing else had co-operated therewith. I need not form an opinion on it.

The appeal should be dismissed with costs.

DUFF, J., agreed that the appeal should be dismissed with costs. Duff, J.

ANGLIN, J.:—We are asked to reverse the finding of the Supreme Court of Saskatchewan, sitting *en banc*, that the defendant in taking and having registered a transfer from Mrs. K. A. White to himself of a quarter section of homestead land committed a fraud, and to restore that of Newlands, J., that he merely made an innocent mistake, and that, in giving his testimony at the trial that he had bought and paid for this quarter section, he was also honestly mistaken—the fact being as found by the learned trial Judge, that he had given no consideration for the transfer of it but had bought an adjacent quarter section which had been conveyed to him and subsequently sold by him. Anglin, J.

I agree with Wetmore, C.J.,

> looking at the general character of Annable's testimony and his conduct, and the testimony of William J. White, I cannot bring my mind to look upon his action with the same degree of charity that the trial Judge did.

I agree with the view of the evidence taken by Brown, J., and with his conclusion that

> when the appellant got the transfer of this land from Mr. Grayson's office he had no right whatever to it, and he must have taken it and had it registered knowing that he had no right to it and in fraud of the plaintiff.

It is within the province of an appellate Court and it is its duty,

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even where, as in this case, the appeal turns upon a question of fact, to re-hear the case, not shrinking from overruling it if, on full consideration the Court comes to the conclusion that the judgment is wrong: *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704; *The "Gaetano"* [1899] 2 Ir. R. 1.

This rule was acted upon by the Judicial Committee in the recent case of *Gordon* v. *Horne* (29th July, 1910), 43 Can. S.C.R. 9, 42 Can. S.C.R. 240.

It is, in my opinion, not possible to say that the full Court erred in taking a view of the evidence different from that of the learned trial Judge and in affirming his judgment on the ground of fraud which he had failed to find. His error was susceptible of demonstration wholly by argument: *Khoo Sit Hoh* v. *Lim Thean Tong*, [1912] A.C. 323.

In dismissing the appeal, however, I do not wish to be understood as dissenting from the view of the law expressed by Newlands, J. I find it unnecessary to consider that aspect of the case.

Brodeur, J.

BRODEUR, J., agreed that the appeal should be dismissed with costs.

Appeal dismissed.

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CAREY v. ROOTS.

Alberta Supreme Court. Trial before Stuart, J. July 2, 1912.

1. CONTRACTS (§ IV F—370)—TIME IN WHICH AN OPTION TO PURCHASE LAND MAY BE ACCEPTED—ABSENCE OF TIME IN CONTRACT—REASONABLENESS.

In the absence of any statement in the agreement or of assistance from the surrounding circumstances, the law allows a reasonable time for the acceptance of an option to purchase land.

2. CONTRACTS (§ I D 4—62*a*)—ACCEPTANCE OF OPTION TO PURCHASE LAND—TRANSFER BY OWNER TO INNOCENT THIRD PARTY BEFORE PAYMENT DUE—NECESSITY OF TENDERING PAYMENT.

Where the owner of land gives an option to purchase, which requires the first payment for the land to be made by a certain date, and provides no other manner of accepting the option, and before such date the owner transfers the land to a third person, without the knowledge or consent of the holder of the option, the holder is relieved from the necessity of tendering the first payment, and an acceptance of the option by letter without any such tender is effectual.

[*McKay* v. *Wayland*, 2 O.W.N. 741, 18 O.W.R. 696, referred to. See also Dart, Vendor and Purchaser, 7th ed., p. 273.]

3. CONTRACTS (§ I E 5—95)—OPTION TO PURCHASE LAND—PURCHASER RESIDING AT A DISTANCE—SUFFICIENCY OF ACCEPTANCE BY LETTER.

An option to purchase land given to a person living at a distance from the owner may be effectually accepted by letter.

[*Bruner* v. *Moore* (1904), 1 Ch. 305, referred to.]

4. SPECIFIC PERFORMANCE (§ I E 1—32)—RIGHT TO REMEDY—PURCHASE OF LAND WITH NOTICE OF OUTSTANDING OPTION.

One who purchases land with notice of the rights of the holder of an option thereon is subject to a decree for specific performance at the suit of the holder of the option.

[*Savereux* v. *Tourangeau*, 16 O.L.R. 600, referred to.]

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TRIAL of an action for specific performance of an agreement for the sale of land by defendant to plaintiff.

Judgment was given for the plaintiff.

A. H. Clarke, K.C., for the plaintiff.
James Muir, K.C., for the defendants.

STUART, J.:—On the 25th November, 1911, the plaintiff, an officer of the Royal Engineers, residing at Winnipeg, secured from the defendant Roots, a farmer living near Medicine Hat, the following option:—

> In consideration of a payment of $10, I agree to give to Major A. B. Carey the option of my quarter section N.E. quarter of 20 Tp. 12 Medicine Hat at the rate of $25 per acre. Balance to be paid one-third on the last day of January each year till paid.
>
> E. H. ROOTS.

The plaintiff had met the defendant Roots by accident in Medicine Hat on the morning of the 25th November, and had got into conversation with him, and had learned that Roots had a quarter section of land for sale at $25 per acre. Roots had told the plaintiff that he wanted one quarter down; but the plaintiff had no cash with him; and, when he went out to Roots's place in the evening to see the land, he told Roots that he was expecting money from England, and suggested one-third on the 31st January and the balance in one and two years. The defendant said he was quite willing to wait longer than that for the first payment, as he was not intending to leave till the spring. Accordingly, the plaintiff drew up the above memorandum in lead pencil in his note-book, and Roots signed it. No copy of it was given to Roots.

On the 30th November, the plaintiff filed a caveat in the land titles office to protect his interest. On the 3rd December, Roots executed a transfer of the land to the defendant Brown for the consideration of $5,000, and this was registered on the 17th December, and a certificate of title was issued in the name of Brown. Simultaneously with the execution of the transfer to Brown, a mortgage was executed by Brown in favour of Roots for $4,000, and this was registered on the 17th December.

The defendant Roots, in his examination for discovery, said that he had received only $50 in cash from Brown, and that he didn't know anything about the balance of $950. Some time in December, the plaintiff received his money, and the 11th January, he wrote to Mr. Allison, his solicitor at Calgary, to close the matter up. He did not, however, forward the necessary funds to his solicitor until the 25th January. Before that date, viz., on the 20th January, Allison wrote a letter to Roots, in which, after stating that he was acting for Carey in regard to the purchase, he went on to say: "Major Carey is prepared to

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make payments of one-third of the purchase-price, and we are anxious to close the matter out at once"; and he proceeded to suggest that a transfer be given with a mortgage back by Carey for the unpaid balance, and asked that Roots communicate with him at once.

This letter was received by the defendant Roots, and apparently before the end of January. The envelope bears the Medicine Hat post office stamp with date the 24th January; and, on his examination for discovery, Roots, in answer to the question, "This letter came within the time, that he had to accept the option"? answered, "I guess so."

I find, therefore, as a fact that it was received before the 31st January, because that would be most probably the time at which Roots would expect the option to be taken up, although nothing is said in the memorandum in regard to it. When asked why he did not reply to this letter, Roots said, "I don't know anything about it." He said that he gave the letter to the defendant Brown in his office, and that Brown had taken it to Mr. Mahaffy, the solicitor for the defendants. Nothing more seems to have occurred until the 20th March, when Mr. Begg, of Medicine Hat, under instructions from Mr. Allison, went out to Roots's place and tendered him the sum of $1,347.19 in legal tender, and asked Roots to sign an agreement of sale, which Carey had already signed. Roots refused the money before the agreement of sale was mentioned. He said that he would like to think about it, and, as Begg stated, "mentioned Mr. Brown." Finally, he refused to take the money. The amount was arrived at as follows. It was assumed that there were 160 acres of land. At $25 an acre that would be $4,000; $10 was paid at first; and one-third of the balance is $1,330; $17.19 was added as interest at 5 per cent. from the 31st January. The memorandum, it will be observed, makes no mention of interest; and the evidence is, that, in fact, the subject of interest was not mentioned between the parties.

Neither of the defendants gave any evidence at the trial, and no evidence was tendered on their behalf. It is plain from Roots's examination for discovery that the defendant Brown knew about the agreement with the plaintiff before the transfer of the 3rd December was given and the $50 paid.

Roots says that Brown assured him that the agreement with the plaintiff was "no good in law." In view of the fact that only $50 was paid to Roots by Brown; that $950 was left unsecured, and a mortgage taken back for $4,000; and in view of the further fact that neither Brown nor Roots ventured into the witness-box to explain their conduct; I am of opinion that the dealing between them was merely an attempt to defeat Carey's rights, if possible.

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The memorandum signed does not mention either the date on which or the manner in which the option was to be accepted. As to the date of acceptance, if there was nothing to assist in the surrounding circumstances, I think the law would imply a reasonable time. It does not necessarily follow that, because the agreement mentions the last day of January as the time for the payment of the first instalment of the purchase-money, therefore, that must be the date intended for the acceptance of the option. This, however, is what Roots evidently thought it meant; for he says in his examination for discovery, "I thought it was simply to hold the property for him until he made his payment." This is confirmed by his statement to Carey that any time before spring would do, as he was not going away before then.

I doubt, however, whether the Court has a right to consider what Roots says as to his own interpretation of the contract, and also whether a statement made by him, even before the signature of the memorandum, is a "circumstance" which I can take into consideration in order to discover the intention of the parties. But, in my opinion, the action of the defendants on the 3rd December, within nine days after the memorandum was signed, in concocting a scheme evidently to defeat the plaintiff's rights, obviates the necessity of examining very closely the question as to the date at which the option was to be taken up.

The defendants contend that only by payment of the money could the option be accepted. Adopting that view, and even admitting in the defendants' favour that only a reasonable time was allowed for such acceptance, and that the period till the 31st January was more than a reasonable time, which is, of course, inconsistent, because the agreement clearly means that the first payment was to be made on the 31st January—nevertheless, the action of the defendant Roots in transferring the land so soon after giving the option to Carey, and certainly before a reasonable time had elapsed for acceptance, must surely have the result of relieving Carey from the necessity of tendering the money as a mode of acceptance. Roots had put it out of his power to give good title, and had done so deliberately, in order, as I hold, to try and defeat the plaintiff's claim.

Even if the view be adopted that, although the money was not to be paid till the 31st January, yet an intimation of acceptance should have been given in some other way within a reasonable time, still I think, in view of what Roots had said and his own admission on discovery which I have quoted, that the letter from Allison was written within a reasonable time. Although I may not be able to consider this evidence with a view to discovering the *intention* of the parties, and so construing the agreement itself, I think it may be considered in endeavouring to ascertain what was a reasonable time. I think also a post let-

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ter was a proper way of indicating acceptance, in the circumstances: *Bruner* v. *Moore*, [1904] 1 Ch. 305, 316.

As to the effect of Roots's dealings with Brown, see Dart on Vendor and Purchaser, 7th ed., at p. 273, and *McKay* v. *Wayland*, 2 O.W.N. 741, 18 O.W.R. 696. Inasmuch as Brown purchased with notice of the plaintiff's rights, he is, just as much as Roots, subject to a decree for specific performance: *Saxcroix* v. *Tourangeau*, 16 O.L.R. 600, 11 O.W.R. 994.

In my opinion, therefore, the option became through the acceptance of the 20th January, an effective agreement; and the plaintiff is entitled, upon paying the money into Court, to a decree that it should be specifically performed. I think, however, that I have a right to add one thing. I am satisfied that the omission to speak of interest and taxes was a mere oversight in both parties. A decree for specific performance is an exercise of the equitable jurisdiction of the Court, and the Court has a discretion.

The plaintiff will not be entitled to possession in any case until the money is all paid. The defendant Roots may, therefore, retain possession until the time for final payment; and this will, no doubt, compensate him for the absence of a payment of interest while he keeps possession. However, he will be bound to pay the taxes. If the defendant Roots will consent to give up possession to the plaintiff, I shall impose on the plaintiff the obligation of either paying the whole amount of the purchase-money at once without interest, or of paying a reasonable rate of interest, say seven per cent., per annum. The plaintiff would then have to pay taxes as well. Unless, however, the defendant Roots consents to give up possession, judgment will go for specific performance, the plaintiff to pay no interest, the defendant Roots to keep possession till paid, and to pay taxes in the meantime. The judgment will contain a clause setting aside the mortgage and certificate of title of the defendant Brown, and the defendant Roots will be entitled to get out of Court the instalments as paid in, on shewing that his title is free from encumbrances.

The plaintiff should have his costs of the action.

Judgment for plaintiff.

Richard J. KIRBY (defendant) v. John J. COWDEROY (plaintiff).

IMP. P. C. 1912 June 18.

Judicial Committee of the Privy Council, Lord Macnaghten, Lord Atkinson, and Lord Shaw of Dunfermline. June 18, 1912.

1. EVIDENCE (XI U—892)—SUFFICIENCY OF POSSESSION OF LAND—MATTERS TO BE CONSIDERED.

Possession of land must be considered in every case with reference to the peculiar circumstances; the character and value of the property, the suitable and natural mode of using it, and the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests must all be taken into account in determining the sufficiency of the possession.

[*The Lord Advocate* v. *Lord Lovat*, 5 A.C. 273; and *Johnson* v. *O'Neill*, [1911] A.C. 552, referred to.]

2. ADVERSE POSSESSION (§ I K—58)—POSSESSION UNDER CONVEYANCE INTENDED AS SECURITY—WILD LANDS—PAYMENT OF TAXES BY GRANTEE—REDEMPTION—B.C. STATUTE OF LIMITATIONS, R.S.B.C. 1911, ch. 145.

Where a grantee of wild land in British Columbia under a conveyance intended only as security has for more than 20 years performed the only act of possession of which it is capable, namely, paid all the taxes upon it, while the grantor although aware of this and under an obligation to make periodical payments of interest, has done and paid nothing, the grantee has had such possession as to give him the benefit of the Statute of Limitations, R.S.B.C. 1897, ch. 123 [see now R.S.B.C. 1911, ch. 145], and an action for redemption by the grantee is barred by that statute.

Statement

APPEAL from a judgment of the Court of Appeal (June 6, 1911) *Cowderoy* v. *Kirby*, 18 W.L.R. 314, reversing a judgment of Hunter, C.J., (January 26, 1911).

The respondent sued to redeem the land in suit and for a declaration that his conveyance thereof dated July 1, 1889, to the appellant was a mortgage. The appellant pleaded that the conveyance was not intended merely as a security, that the respondent had abandoned the property, and relied on the Statute of Limitations, R.S.B.C. 1897, ch. 123.

Hunter, C.J., held that the conveyance was absolute and that the respondent had abandoned his claim. He accordingly dismissed the suit. The Court of Appeal held that the deed of July 1, 1889, was intended to be a mortgage to secure the repayment of $750 with interest at 7 per cent. per annum, and decreed that the respondent was entitled to redeem. As regards the Statute of Limitations it held that the appellant never obtained possession of the land within the meaning of the statute.

The appeal was allowed and the judgment of Hunter, C.J., dismissing the action was restored.

Argument

Davis, K.C., and *Malcolm M. Macnaghten*, for the appellant, contended that the judgment of Hunter, C.J., was right and that the respondent was barred by limitation. They referred to R.S.B.C. 1897, ch 123, sec. 40, and also to secs. 16 and 36, and to the Land Registry Act, R.S.B.C. 1888, ch. 67, sub-secs. 18 and 19; also to *Lindsay Petroleum Co.* v. *Hurd* (1874), L.R. 5 P.C. 221, 229

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Macdonald, for the respondent, upon the point of limitation, contended that the appellant never obtained possesion of the land or receipt of the profits or rent, and that the Statute of Limitations had therefore never commenced to run. The statute of 1897, sec. 40, was identical with 3 & 4 Wm. IV. ch. 27, sec. 28, which was in force at the date of the conveyance. The evidence shewed that the appellant never attempted to take possession or to exercise any act of ownership, although to protect the land from compulsory sale he paid the taxes; and accordingly the Act had no application. The respondent's omission to pay the taxes cannot be regarded as an abandonment of his right to redeem.

Counsel for the appellant were not heard in reply.

The judgment of their Lordships was delivered by

Lord Shaw.

LORD SHAW OF DUNFERMLINE:—This action was commenced on April 8, 1910, by a writ of summons in the Supreme Court of British Columbia, by the respondent, who is the plaintiff, against the appellant, the defendant. The action is for the redemption of certain land situated in the district of New Westminister. On January 26, 1911, Hunter, C.J., dismissed the action with costs. On June 6 thereafter the Court of Appeal of British Columbia reversed that dismissal. The present appeal has accordingly been brought. The real and only point of the case is as to the application of the British Columbia Statute of Limitations, ch. 123, R.S.B.C. 1897.

The facts are very simple. Before July, 1889, the appellant, Mr. Kirby, had lent to the respondent, Mr. Cowderoy, certain sums of money, and there can be no doubt that he offered security over certain small parcels or tracts of land in the district of New Westminister. This security took the shape of an absolute conveyance.

The date of the conveyance is July 1, 1889, and it is presumably in the ordinary form of indenture, with the usual clauses "to have and to hold unto the said grantee . . . to and for his sole and only use forever," with a covenant for quiet possession. Notwithstanding the form of this deed, it seems fairly clear, and to be established by letters passing between the parties, that the deed was meant to be a security only. In their Lordships' opinion, so far as the point in the present case is concerned, it is of no importance whether the deed be treated as an absolute conveyance or merely as a mortgage. By secs. 16 and 36 of the Statute of Limitations, an action by any person claiming any land or rent in equity for recovery of the same may be brought only within twenty years. By sec. 40, when a mortgagee has obtained possession,

> The mortgagor or any person claiming through him shall not bring a suit to redeem the mortgage but within twenty years next after the time at which the mortgage obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor or of his right of redemption shall have been given to the mortgagor . . . in writing.

It is admitted that the latter portion of this section does not apply, there being no written acknowledgment, and accordingly the whole question in this case is as to the running of the period of twenty years from the date of obtaining possession of the land. And this question does really not depend upon the reckoning of the lapse of time, but upon another, namely, whether in the circumstances of this case the appellant, Mr. Kirby, ever had possession under the deed of July, 1889.

Before dealing with that, it may be useful, however, to note that the deed appears to be one to which the British Columbia statute, ch. 23, of the Consolidated Acts, 1888, being an Act to facilitate the conveyance of real property, applies. Under sec. 4 of that Act:—

> Every such deed, unless any exception be specially made therein, shall be held and construed to include . . . the estate, right, title, interest, inheritance, use, trust, property, profit, possession, claim, and demand whatsoever, both at law and in equity, of the grantor.

By statute, accordingly, possession is yielded as part of the conveyance. In view of the facts just to be stated, it is not, however, in their Lordships' opinion, necessary to determine any point as to whether the "possession" so conveyed can be reckoned for the period of limitation in face of, say, occupation of the premises in an adverse sense by the grantor of the deed.

For the question in the present case seems to be largely determined by a consideration of what this property so conveyed was. The respondent affirms what was put to him, namely, that "it was simply wild land; no one was in possession of it," and as to the period when the deed was granted, "it never had a value." The respondent's position in regard to the property was very simple. He had got his loan and had granted his conveyance. He came under a promise to pay interest periodically and compound interest and he never made any payment whatsoever. As to the property, he left it severely alone. The appellant, however, was not so fortunate. The property having been duly conveyed to him by the deed of July 1, 1889, he became liable as the owner thereof to pay the taxation upon it. Upon this subject the respondent is asked and answers as follows:—

> Q.—You have never paid any of the taxes, have you, Mr. Cowderoy? A.—No.
>
> By the Court: So that unless he [that is, the appellant, Mr. Kirby] had looked after the property himself his security would have disappeared, and been sold for taxes?

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A.—Well, I knew that he was always attending to it.

Q.—How did you know that? A.—Well, when I saw him sixteen years ago, he told me it was all right, and he was looking after everything.

It appears to be established, in short, that (1) for over twenty years before the institution of this suit the appellant had, so far as this wild land was concerned, performed the only act of possession of which it appeared to be capable, namely, he had paid all the taxation upon it; whereas (2) the respondent was aware that this was being done by the appellant, and he (the respondent), so far from having anything even remotely akin to adverse possession, had washed his hands of all connection with the property. In these circumstances, their Lordships are of opinion that the Statute of Limitation applies, and that it is not open to the respondent thereafter—when, as in the case here, the patch of land appears to have suddenly become of some marketable value—to bring this action to redeem.

On the general subject of possession, the language of Lord O'Hagan in *The Lord Advocate* v. *Lord Lovat*, 5 App. Cas. 273, at p. 288—language cited with approval by Lord Macnaghten in *Johnson* v. *O'Neill*, [1911] A.C. 552, at p. 583—appears to be applicable to the present case. Possession

> must be considered in every case with reference to the peculiar circumstances. The acts, implying possession in one case, may be wholly inadequate to prove it in another. The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests; all these things, greatly varying as they must under various conditions, are to be taken into account in determining the sufficiency of a possession.

There does not appear to their Lordships to be much doubt accordingly that possession of this land was, during the years in question, with the appellant, and no possession of any kind with the respondent.

Their Lordships are accordingly of opinion that the action is excluded by the Statute of Limitations. In this view it becomes unnecessary to consider other aspects of the case dealt with by the learned Chief Justice. They will humbly advise His Majesty that the appeal should be allowed, and the judgment of Hunter, C.J., dismissing the action, should be restored, with the further costs incurred in both Courts since the date of that judgment. The respondent will also pay the costs of the appeal.

Appeal allowed.

MILLS v. FREEL.

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(Decision No. 2.)

Ontario Divisional Court, Boyd, C., Latchford and Middleton, JJ. October 2, 1912.

1. HIGHWAYS (§ VI—266)—HIGHWAY OFFICERS—LIABILITY OF PATHMASTERS—REMOVAL OF FENCE FROM HIGHWAY.

A pathmaster acting within the scope of his instructions from a municipality is not liable to an abutting owner for the removal of a fence erected by the latter enclosing a portion of a road allowance.

[*Mills* v. *Freel*, 2 D.L.R. 923, 3 O.W.N. 1240, affirmed on appeal.]

2. HIGHWAYS (§ V B—255)—NEW ROAD IN LIEU OF ORIGINAL ROAD ALLOWANCE—STATUTORY CONDITIONS AS TO SUBSTITUTION.

An abutting owner cannot claim a right to possession of an original road allowance unless he can establish that he or his predecessors in title had laid out and opened a new public road in lieu of the original road allowance, without having received compensation therefor.

[3 Edw. VII. (Ont.), ch. 19, sec. 641, referred to.]

3. HIGHWAYS (§ V C—260)—ABANDONMENT—POSSESSION OF ROAD ALLOWANCE BY ABUTTING OWNER—SLIGHT USER—ADDITIONAL ROAD.

Where an original road allowance was opened up and actually used by the public throughout its entire length, the fact that, for a short distance, it is only travelled occasionally does not amount to an abandonment; the road opened up by an abutting owner across his land not "in lieu" or "in place" of the original road allowance is in addition to and not in substitution thereof, and the abutting owner cannot claim the benefit of the provisions of 3 Edw. VII. (Ont.), ch. 19, sec. 642, by which an abutting owner who encloses an unopened road allowance with a lawful fence where he has provided a substituted road, is legally possessed thereof against any private person.

[*Mills* v. *Freel*, 2 D.L.R. 923, 3 O.W.N. 1240, affirmed on appeal.]

Statement

APPEAL by the plaintiffs from the judgment of RIDDELL, J., *Mills* v. *Freel*, 2 D.L.R. 923, 3 O.W.N. 1240.

The appeal was dismissed.

J. M. McEvoy and *A. G. Chisholm*, for the plaintiffs.

W. R. Meredith, for the defendants.

Latchford, J.

LATCHFORD, J.:—I see no ground for interfering with the judgment appealed from. The defendant Freel was acting for the municipality, and within the scope of his instructions as pathmaster, in removing the plaintiffs' fence. As against the municipality, the plaintiffs can assert no right of possession, unless they can bring themselves within the provisions of sec. 641 of the Municipal Act, 3 Edw. VII. ch. 19, and establish that they or their predecessors in title had laid out and opened, "in place" of the concession road, the road now known as the "given road," across their property, without receiving compensation therefor: or that, "in lieu" of the original allowance for road, the "given road" had been laid out and opened, and no compensation had been paid to the owners for the land so appropriated.

Upon the evidence, it is clear that the road across the plaintiffs' property was not laid out or opened "in lieu" or "in place" of the original concession road, but was made in addi-

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tion to the concession road. The original road allowance was not only not abandoned but it was opened for public use. It was actually used by the public throughout its entire length—not, indeed, to any great extent between the gravel pit and the Thames—but even for that short distance occasionally travelled when the river was low and fordable. As the concession road was not "unopened," sec. 642 has no application.

It may be observed that even north of the point of departure of the "given road" from the concession road, the plaintiffs' fence encroaches upon the concession line, there admittedly in continuous public use for upwards of fifty years.

The appeal should be dismissed with costs.

Middleton, J.

MIDDLETON, J., agreed with LATCHFORD, J.

Boyd, C.

BOYD, C., agreed in the result.

Appeal dismissed.

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Re AUGER.

Ontario Divisional Court, Meredith, C.J.C.P., Teetzel and Kelly, JJ. May 11, 1912.

1. DOWER (§ I B—11)—RIGHT OF WIFE TO—PROPERTY PURCHASED BY HUSBAND AND MORTGAGE GIVEN FOR PART OF PURCHASE-MONEY—WIFE JOINING TO BAR HER DOWER.

The wife of a purchaser of land, who has joined, to bar her dower, in a mortgage to secure unpaid purchase-money, is not entitled to dower in the whole value of the land, but only in the value of the land after deducting the amount of the mortgage debt.

[*Campbell* v. *Royal Canadian Bank*, 19 Gr. 334, followed; *Lindsay* v. *Lindsay*, 23 Gr. 210; and *Robertson* v. *Robertson*, 25 Gr. 486, distinguished; *Re Croskery*, 16 O.R. 207; and *Re Williams*, 7 O.L.R. 156, referred to; *Re Auger*, 3 O.W.N. 377, reversed on appeal.]

2. DOWER (§ I B—11)—RIGHT OF WIFE BARRING DOWER IN MORTGAGE NOT GIVEN TO SECURE UNPAID PURCHASE-MONEY.

A wife who has joined, to bar her dower, in a mortgage by her husband which was not given to secure unpaid purchase-money, is entitled, subject to the rights of the mortgagee, to dower in the whole value of the mortgaged land. (*Per* Meredith, C.J., and Teetzel, J.)

[*Doan* v. *Davis*, 23 Gr. 207, and *Lindsay* v. *Lindsay*, 23 Gr. 210, referred to.]

Statement

MOTION by the administrator of the estate of Michael Auger, deceased, upon an originating notice under Con. Rule 938, for an order determining the rights as to dower of Sarah Auger, the widow of the deceased, in the lands devolving upon his death.

The present appeal was taken by some of the next of kin from the following decision of MIDDLETON, J., also reported 3 O.W.N. 377.

Middleton, J.

December 15, 1911. MIDDLETON, J.:—The question arising upon this motion is, the basis upon which dower should be allowed to Sarah Auger, the widow of the deceased.

The late Michael Auger, who died on the 12th May, 1909, on the 1st November, 1898, purchased the lands in question for

$3,000—$2,800 being secured by a vendor's lien and mortgage, in which his wife barred her dower. The deed and mortgage were practically contemporaneous transactions—the inference being that the deed was first delivered, as it contains a clause, "and the grantor releases to the grantee all his claims upon the said lands, excepting the said lien for unpaid purchase-money and the mortgage to be given therefor." The mortgage had been reduced to $1,700 before Auger's death; and, since his death, the lands have been sold for $5,250, and the widow has joined the administrator in conveying; her rights being reserved for the opinion of the Court. The question is: has she a life interest in $1,750, a third of this price, or in $1,183.33, a third of the price less the mortgage?

Smith v. *Norton* (1861), 7 U.C.L.J. O.S. 263, a decision of the Court of Error and Appeal, determines that at common law the seisin of the husband was complete and the right to dower attached. Esten, V.-C., distinguishes the case from a conveyance operating under the Statute of Uses, where the grantee to uses is a mere conduit to convey the estate to the person entitled, saying that, where the mortgage and deed are one transaction, "the person is by the deed fully and perfectly seised of the estate until by his own act (not the act of another) he parts with it by executing the mortgage." The case then before the Court was an appeal from a common law Court, in an action of dower by the widow of the purchaser, who had not joined in the mortgage back to secure the purchase-money. It was intimated by some of the Judges that in equity the mortgagee might obtain relief.

In the next year a similar question arose in *Heney* v. *Low* (1862), 9 Gr. 265. There again the wife did not join in a mortgage to secure the balance of purchase-money. The purchaser sold the equity of redemption, and the original vendor, who still held the mortgage, obtained a reconveyance. On an action being brought, at law, for dower, a bill was filed in equity to restrain the action at law. The situation was complicated by the question of merger; but the question of the widow's right to dower in equity under the circumstances is also satisfactorily disposed of. Esten, V.-C. (p. 269), says: "Supposing, however, the true effect of the agreement to be, that S. in equity retained his mortgage, rather than took it back, so that it is equitably paramount to the title of dower, yet, undoubtedly, that title attached for every other purpose, and as against every other person. It could have been enforced against Low's heir. For every other purpose except to give priority to the mortgage the purchase-money must be considered paid, and the estate conveyed." Spragge, V.-C., after pointing out that the legal right to dower could not be denied, and that the mortgagee would be protected in equity, says of the purchaser of the equity of redemption (p. 277): He "surely could have no equity to prevent the assertion of Mrs. Low's legal title to dower. . . . She could claim her dower not against S., mortgagee, but against S., alience of her husband; and I really

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do not see upon what principle this Court could interpose, unless in respect to the mortgage."

This being the situation when the wife does not join in the mortgage to bar her dower, her joining is, under sec. 10 of the Dower Act, 1909, to have no greater effect than necessary to secure the rights of the mortgagee.

Had the land been sold under this mortgage, sec. 10 (2) of the Dower Act would have applied and governed the widow's rights in the surplus money; but, where the land passes to the administrator, the rights of the parties are still regulated by *Robertson* v. *Robertson* (1878), 25 Gr. 486, and *Re Hague* (1887), 14 O.R. 660; and the wife, being a surety for her husband, has the right to cast the burden of the mortgage primarily on his estate. Neither the husband, nor any one claiming under him, has any equity which can be set up against her legal right to dower, which she has pledged as surety only for the husband's debt.

So declare. Costs out of the estate.

Certain of the next of kin of Michael Auger appealed from the order of MIDDLETON, J.

The appeal was allowed.

Argument

D. Urquhart, for the appellants, argued that the respondent was entitled to dower based upon the proceeds of the sale of the land, after deducting the amount remaining due upon the mortgage at the time of the death of her husband, and not upon the total proceeds of the sale of the land. He referred to *Campbell* v. *Royal Canadian Bank* (1872), 19 Gr. 334; *Pratt* v. *Bunnell* (1891), 21 O.R. 1; *Re Williams* (1903), 7 O.L.R. 156; *Norton* v. *Smith* (1860), 20 U.C.R. 213, at p. 217; *Parke* v. *Riley* (1866), 3 E. & A. 215; *Re Hopkins, Barnes* v. *Hopkins* (1879), 8 P.R. 160; *Gemmill* v. *Nelligan* (1894), 26 O.R. 307, at pp. 313, 315; *Strong* v. *Lewis* (1850), 1 Gr. 443, at p. 445; 42 Vict. ch. 22, secs. 1, 2 (O.); 58 Vict. ch. 25, sec. 3 (O.)

J. J. Maclennan, for the respondent, Sarah Auger, argued that the widow was entitled to dower based upon the total value of the property. He referred to *Robertson* v. *Robertson*, 25 Gr. 486; *Doan* v. *Davis* (1876), 23 Gr. 207. The judgment below was right and should be affirmed.

Urquhart, in reply, referred to Cameron on Dower, p. 249, sec. 35.

Meredith, C.J.

May 11, 1912. MEREDITH, C.J.:—This is an appeal by certain of the next of kin of Michael Auger, the husband of the respondent, from an order of Middleton, J., dated the 15th December, 1911, declaring the respondent to be "entitled to dower in the full value of the lands of which he was seised at the time of his decease, payable out of the proceeds of the sale thereof now in the hands of the administrator, in priority to all other claims against the estate of the said Michael Auger."

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Auger owned at the time of his death the equity of redemption in the land as to which the question arises. The land was purchased by him from Henry Gooderham, and the conveyance to Auger bears date the 1st November, 1898. The purchase-price is stated to be $3,000; and one of the recitals in the conveyance is, that it had been agreed that $2,800 of this sum should remain a lien upon the land, to be collaterally secured by a mortgage of it.

The release clause, according to the statutory form, is altered to read as follows: "And the said grantor releases to the said grantee all his claims upon the said lands, excepting the said lien for unpaid purchase-money and mortgage to be given therefor."

The mortgage bears the same date, and the respondent joined in it to bar her dower.

The mortgage-money was reduced by payment to $1,700 in the lifetime of the mortgagor, and he died intestate on the 12th May, 1909. The land has been sold by his administrator for $5,250; and the question for decision is, whether the respondent's dower is to be calculated on the proceeds of the sale of the land or only upon the proceeds after deducting the amount remaining due upon the mortgage at the time of the death of her husband.

Before any legislation on the subject, it had been held, in *Campbell* v. *Royal Canadian Bank*, 19 Gr. 334, that where a wife joins with her husband to bar dower in mortgage to secure the purchase-money of mortgaged lands, and the husband dies, and the mortgaged land is sold to satisfy the mortgage, she is entitled to dower in the proceeds after satisfying the mortgage debt, but no more. The Chancellor (Spragge) delivering judgment said that "by the sale the purchaser stands in the place of the heir, and occupies, as to the widow, the same relative position that the heir had done;" and that he thought "it must now be taken as settled that, as between the widow and creditors, she is dowable only in respect of the value of the land in excess of the incumbrance, *i.e.*, of course, in a case where, as in this case, she is bound by the incumbrance."

These observations do not appear to be limited to cases in which, as in the one he was dealing with, the mortgage is for unpaid purchase-money, and it may be that he did not intend them to be so limited.

However, in the subsequent case of *Doan* v. *Davis*, 23 Gr. 207, where the mortgage was not given to secure unpaid purchase-money, the same learned Judge held that the widow was entitled to dower out of the whole value of the mortgaged premises, and not only out of their value beyond the mortgage-debt.

Doan v. *Davis* was approved and followed by Proudfoot, V.-C., in *Lindsay* v. *Lindsay* (1876), 23 Gr. 210.

In *Robertson* v. *Robertson*, 25 Gr. 486, it was decided, as the head-note states, "that a woman is entitled to dower in lands on which she and her deceased husband had joined in creating

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a mortgage to secure a debt of the husband; and that in ascertaining such dower the value of the whole estate is the basis of computation, not the amount of surplus after discharging the claim of the mortgagee." That was the conclusion reached by a majority of the full Court on the rehearing of an order pronounced by Proudfoot, V.-C., a report of whose judgment is found in *Re Robertson* (1877), 24 Gr. 442.

The Vice-Chancellor there expressed his approval of the opinion of VanKoughnet, C., in *Sheppard* v. *Sheppard* (1867), 14 Gr. 174, notwithstanding that the same learned Judge, in the later case of *Thorpe* v. *Richards* (1868), 15 Gr. 403, had expressed a doubt whether he had not gone too far in the former case, in giving the wife the value of her dower in the entire estate, as against the creditors of her husband; and the learned Vice-Chancellor pointed out that it was not necessary in the later case to consider that question. The Vice-Chancellor also referred to two decisions of Mowat, V.-C., *White* v. *Bastedo* (1869), 15 Gr. 546, and *Baker* v. *Dawbarn* (1872), 19 Gr. 113, to the effect that "the widow was not entitled, as against creditors, to the exoneration of the mortgaged estates from the mortgage out of either the personal estate or the other real estate left by her insolvent husband at the time of his death;" and distinguished these cases on the ground that there does not appear to have been any surplus from the mortgaged property after payment of the incumbrances.

Campbell v. *Royal Canadian Bank*, so far as it is a decision that, where a wife joins in a mortgage by her husband to secure unpaid purchase-money, she is not entitled to dower in the value of the land, but only on the value after deducting the mortgage-debt, was never questioned, and was referred to with approval by Proudfoot, V.-C., in *Lindsay* v. *Lindsay*, at p. 213, and again in *Robertson* v. *Robertson*, 25 Gr. at p. 501, where he says: "Where the mortgage has been given for the purchase-money of the land, it is quite reasonable that the widow should only have dower in the value of the land after deducting the amount of the mortgage, for that was the extent of the beneficial interest of the husband. That was the case in *Campbell* v. *Royal Canadian Bank*."

I refer also to *Re Croskery* (1888), 16 O.R. 207, and *Re Williams*, 7 O.L.R. 156.

In this state of the decisions, 42 Viet. ch. 22 was enacted.

By its first section that Act provides:—

"1. No bar of dower contained in any mortgage, or other instrument intended to have the effect of a mortgage or other security, upon real estate, shall operate to bar such dower to any greater extent than shall be necessary to give full effect to the rights of the mortgagee or grantee under such instrument."

And by sec. 2 it is provided:—

"2. In the event of a sale of the land comprised in any such mortgage or other instrument, under any power of sale contained

therein or under any legal process, the wife of the mortgagor or grantor who shall have so barred her dower in such lands, shall be entitled to dower in any surplus of the purchase-money arising from such sale, which may remain after satifaction of the claim of the mortgagee or grantee, to the same extent as she would have been entitled to dower in the land from which such surplus purchase-money shall be derived had the same not been sold."

It has been generally understood, I think, that what led to this legislation was the uncertainty as to the law as evidenced by the conflicting decisions, to some of which I have referred, and that the purpose of sec. 1 was to declare the law as it had been held to be in *Campbell* v. *Royal Canadian Bank*, and *Robertson* v. *Robertson*. Section 2 was intended, as was said by Patterson, J.A., in *Martindale* v. *Clarkson* (1880), 6 A.R. 1, 6, to give the wife a new right in a case where she had joined in the mortgage, her husband having at the time the legal estate, and the land was subsequently sold under a power of sale in the mortgage or under legal process. The nature of this new right was considered and explained by Ferguson, J., in *Re Luckhardt* (1898), 29 O.R. 111, the present Chancellor agreeing with the opinion he there expressed.

The principle upon which the Court of Chancery proceeded before this statute was, that a wife who joined in a mortgage for the purpose of barring and barred her dower in the mortgaged lands, barred it only for the purpose of the security given to the mortgagee; and that is what, in substance, sub-sec. 1 provides; and it follows, I think, that the widow's rights under sub-sec. 1 are no greater than they had been decided to be in the view of the Court of Chancery as to the effect of the bar of dower before the statute; and that was to have dower in the surplus calculated on the full value of the land, where the mortgage was to secure a debt of the husband, except where the debt was for unpaid purchase-money of the mortgaged land, and in that case calculated on the value in excess of the incumbrance.

By a later Act, 58 Vict. ch. 25, sec. 3, it was provided:—

"3. In the event of the land, comprised in any mortgage or other instrument hereafter executed by which the mortgagor's wife barred her dower, being sold under any power of sale contained in the mortgage, or under any legal process, the wife shall be entitled to dower in any surplus of the purchase-money arising from such sale, which may remain after satisfaction of the claim of the mortgagee or grantee, to the same extent as she would have been entitled to dower in the land had the same not been sold; and the amount to which she is entitled shall be calculated on the basis of the amount realised from the sale of the land, and not upon the amount realised from the sale over and above the amount of the mortgage only. This section shall not apply where the mortgage is for the unpaid purchase-money of the land; and nothing in

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this section contained shall be construed to affect, by implication or otherwise, any question in the case of mortgages heretofore executed."

Except for the provision as to the basis for calculating the amount to which the wife is to be entitled for her dower, this section does not differ in substance from sec. 2 of the Act of 1879.

While sec. 3 applies only to cases in which the mortgaged land has been sold under a power of sale in the mortgage or under legal process, it, like sec. 2 of the earlier Act, provides that the wife is to be entitled to dower in the surplus to the same extent as she would have been entitled to dower in the land had it not been sold; and in the provision as to the basis for calculating the amount to which the wife is to be entitled, the Legislature indicates, I think, that the draftsman was under the impression that that would have been the measure of the wife's rights if the land had not been sold.

If the order appealed from is right, as sec. 3 is confined to cases in which the land is sold under power of sale in the mortgage or under legal process, it would follow that in other cases a different rule would be applicable, and in them the widow's dower would be calculated on the basis of the value of the land irrespective of whether or not the mortgage was given to secure purchase-money. I can see no reason for such a distinction, and this affords, I think an additional reason for construing sec. 1 of the Act of 1879 as I have construed it.

I am, for these reasons, unable to agree with the opinion of my brother Middleton, and am of opinion that the appeal should be allowed, and that there should be substituted for the declaration which he made, a declaration that the respondent is entitled to dower in the purchase-money of the mortgaged land, after deducting from it the amount which remained owing on the mortgage at the time of her husband's death; and there should be no order as to the costs of the appeal or the costs of the proceedings before my brother Middleton.

Teetzel, J.

TEETZEL, J.:—I agree.

Kelly, J.

KELLY, J.:—I agree in the result.

Appeal allowed.

SNAIR v. HUME.

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Nova Scotia Supreme Court, Sir Charles Townshend, C.J., and Meagher, and Russell, JJ. March 12, 1912.

1. EVIDENCE (§ II K 2—343)—BOUNDARIES—BARN AND FENCE AS LINE—OFFER TO PURCHASE STRIP—AGREEMENT TO FIX—OCCUPATION FOR THIRTY YEARS—TITLE BY POSSESSION.

Where, in a dispute as to the proper boundary between two farms, both owners claim a strip lying between them, and it appears that a fence, which has been standing for some 30 years, and was built by the defendant, throws the disputed strip on the plaintiff's side, and that the defendant's barn forms part of and is in line with the fence, though he says that he did not know the true boundary when he built the fence and barn, and a road has been made upon the strip by the plaintiff, who has had such use and occupation as is possible in the case of such land, and the defendant has repeatedly attempted to purchase the strip from the plaintiff, and there is evidence tending to shew an agreement by the defendant to fix as the boundary the line contended for by the plaintiff, the proper conclusion is that the plaintiff has established title by possession to the strip in dispute.

Statement

APPEAL from the following judgment of Drysdale, J., in favour of defendant in an action claiming damages for trespass to lands.

Drysdale, J.

DRYSDALE, J.:—I am at a disadvantage in taking up this case, inasmuch as the evidence was all taken and heard before Mr. Justice Longley, and since that learned Judge's illness, I have had the benefit of an argument on the extended notes only without hearing any of the witnesses.

The claim is in trespass and arises by reason of defendant using a road adjoining his barn for the purposes of hauling stuff to and from the seashore. Both parties claim through a common grantor, and both assert title to the *locus*.

The plaintiff, so far as I can see, has not made any effort to establish the bounds of the property comprised in his deed, but has confined himself to general evidence of occupation of his lot, and asserts over 20 years' actual occupation of a field right up to a fence erected by defendant from the latter's barn to the main road and from the barn to the shore or shore road. The piece in dispute is a road used by defendant outside of this fence, and running next to it, and which defendant alleges was built by him on his own land next the fence for the purposes of his own user in connection with his own land.

I am of opinion that plaintiff has failed to establish that the strip in question is included within the boundaries mentioned in his deed, and this leaves his right of action to depend on the question of possession. I think the plaintiff has failed to establish that exclusive possession that is necessary to give him title to the strip in dispute. The defendant built, or if he did not originally wholly build the road, has certainly kept it up and used it for many years and has been asserting his right thereto, and at the time of this action was openly using the strip as a

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road and more in the occupation thereof than plaintiff was, and I cannot conclude that plaintiff has a right to recover in trespass against the defendant on the question of possession.

Whether the strip is included in defendant's deed depends on properly locating the bounds of the different conveyances. The necessary monuments to locate the plaintiff's lands as described in his conveyances are not, I think, shewn, and it is not at all clear that defendant has sufficiently established the starting point of the description in his deed to enable me to say that defendant's conveyances cover the *locus*. The plaintiff, however, I think, fails both on the question of title and possession. It was argued before me that defendant was precluded from asserting that his western line was other than the fence running each way from his barn by reason of a survey leading to an agreement with the Hubleys respecting the line between the Hubleys and defendant's barn, and by reason of the agreement made with the Hubleys. This survey and agreement involved defendant's south line, and not the side line in dispute, and I do not think that anything that took place in connection with that survey, or anything shewn on the plan annexed to that agreement, precludes defendant as against the plaintiff from insisting on his right to his full complement of land on his west side line. That agreement is a thing between others, and I do not think, even if defendant's west side line is shewn on the plan attached to the Hubley agreement as a line in the place where plaintiff claims it ought to be, this fact can or ought to preclude defendant as against plaintiff from having defined the true line between the parties herein—perhaps the agreement was only intended to be used as an admission by defendant as to the location of his side line at that time. This, I think, is the most that can be said about it, but in view of defendant's open assertion of his right to the road both before and since that time, and of his user thereof, I do not think as an admission to the Hubleys it can affect the situation. On looking at the agreement attached to the plan, I doubt if it can be said to be an admission as to a location of the side line.

On the whole evidence, I am of opinion plaintiff fails in the action, and that the same should be dismissed with costs.

The appeal was allowed.

H. Mellish, K.C., for appellant.
W. F. O'Connor, K.C., for respondent.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—This case was tried before Longley, J., but in consequence of his illness before giving judgment, it was referred to Drysdale, J., who found on the evidence in favour of defendant. From his decision this appeal has

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been taken. The dispute is simply as to the correct location of the boundary line between the lands of plaintiff and defendant. There is no question as to the title, as both trace it to the same original source, James C. Boutilier. He conveyed plaintiff's lot to Rachel Halliday by deed dated July 10th, 1855, and by the description of the lot she is "bounded on land owned by Samuel Boutilier" on one side. This is the boundary in dispute. The defendant's title begins with a deed dated 1st December, 1852, from James C. Boutilier to Samuel Boutilier with the following description:—

> Beginning at the south side of the road leading from Halifax to Chester bounding or butting land of Alexander Hubley, to go the same course or line south-west three chains, and twenty-five links to a stone wall; thence to go north by west six chains; thence north-west two chains to a cross road that goes or leads to the Halifax and Chester road (which the aforesaid James C. Boutilier is to have and to hold, and doth reserve, etc.); from thence to go north-west by west four chains and fifty links; from thence north-east five chains and twenty-five links to the Halifax and Chester road; thence to follow the same to the place of beginning.

This description includes two lots divided by this reserved road. One called the "homestead lot," now owned by the defendant adjoining plaintiff's land, and the other called the "Patch."

Samuel Boutilier died intestate leaving a son Tristram, a daughter Alice, defendant's wife, and his widow Rachel. The son conveyed his interest in these two lots by separate descriptions to his mother Rachel, who in turn conveyed to the defendant the homestead lot. The land is described in his deed as follows:—

> Homestead lot beginning at a rock marked X or a cross by the north-east angle of land now belonging to John Moran; thence to run north-east until it comes to the Halifax and Chester road; thence by said road until it comes to land of James Hubley; thence south-west until it comes to or butts said John Moran's property at the north-west angle, or bound by the shore; thence by said Moran's line or land south-east by east to the place of beginning.

Between the homestead lot, and plaintiff's land running from the shore to the Chester road, there is a small strip of land on which a road has been made, or partially made, about twenty-four feet in width, which is the subject of this litigation. It has been proved—in fact it is not disputed—that a fence has been there for the last twenty-five to thirty years, which fence throws the disputed territory on plaintiff's side. This fence leads up to the defendant's barn, which barn is a part of it, and in line with it the whole distance. As has already been said this fence has been there for a period of long over twenty years, and as the defendant states, was built, as well as the barn, by himself. This

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fact, a very strong and convincing piece of evidence to my mind, is sought to be explained by defendant by saying that when he put it there he did not know where the true boundary line was, and that he was not then the owner of the property. Whether owner or not, he then lived with his mother-in-law using the land. There is contradictory evidence as to who constructed the road in question such as it is.

The weight of the evidence clearly preponderates in plaintiff's favour that it was constructed by those through whom he claims. Moreover the evidence as to use and occupation—such as could be made of the description of land—is very strong indeed, and unless we are to discard as unworthy of belief the testimony of Caleb Hubley, Wilbur Hubley, David Colp, and John G. Colp, men who resided in the neighbourhood most of their lives, and were well acquainted with the land, and the various occupants, it seems to me to be impossible to come to any other conclusion than that the plaintiff has acquired the title by possession, even if not covered by his deed. I know of no reason why we should discredit these witnesses, and if not discredited the conclusion is inevitable.

I am, however, by no means satisfied that defendant's deed covers the *locus*. While it is true Rachel's deed to him makes his south-western boundary four chains and fifty links, and to give him that distance it would be necessary to include the road or strip in dispute, it by no means follows that Rachel had any title or right to the strip to convey the same to him. At that time, 1898, the plaintiff's predecessors were in possession under Samuel Boutilier's conveyance to Rachel in 1855. The fence and the barn were there, and all the indicia to indicate that the strip in question belonged to plaintiff. Then there is strong evidence to the effect that defendant's south-west boundary was acknowledged to be point "D" on the plan which it had in common with Moran's north-west angle, and that angle corresponds with the fence where it is, and has been situated for so many years.

It may be and probably is the case that defendant is short of the quantity of land in his deed by the width of this strip or road, but that fact can confer no right to make it up by encroaching on plaintiff's land. It is rather attributable to the fact that defendant's grantor attempted to convey land to which she had no title.

Then there are the repeated admissions of defendant, which carry great weight, in wanting to purchase this very land, and again in getting permission of the plaintiff and his predecessors to pile his wood there. It is true he denies that he did so, but Mr. Starrat says:—

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When we came to the fence (that is the existing fence where the barn was situated) Hume had not his distance according to the deed, and I saw trouble brewing. I said the land was not worth anything and I tried to bind them; I asked them if they would sign an agreement, and I drew up the agreement, and they signed it, and I drew the plan, and sent it to the man they told me to send it to. This plan shews the western boundary of Hume's land to be the fence running up by the barn—that is to say, the line marked 47 north, 30 east is along the line of this fence. I suppose it was signed by Hume; he agreed to sign it; he signed it in my book, and it was afterwards registered in the registry of deeds.

Sir Charles Townshend, C.J.

This evidence is corroborated by other witnesses, and is not contradicted by the defendant, although he makes some effort to explain his position, but in my view in no way to affect its importance.

Then there is this piece of evidence by Starrat which is very important—the balance of the testimony is "against him." Having regard to the whole evidence, the surrounding circumstances, especially the location of the fence and barn standing for so many years in the same place undisputed placing the road or strip of land in plaintiff's field, I come to the conclusion plaintiff has satisfactorily established a good title to the land in question, and is entitled to recover in this action.

The appeal should be allowed with costs and costs of trial below.

MEAGHER, J., announced that he had reached the same conclusion but on different grounds.

Meagher, J.

RUSSELL, J.:—I agree with the learned Chief Justice that the appeal should be allowed. I think it is very significant that the defendant placed his barn according to the line as claimed by the plaintiff. Assuming the possibility that he placed it several feet away from his boundary, that is inside of his boundary, because of the swampy nature of the land between the barn and the boundary, this would not satisfactorily account for his running his fence to the road on one side and towards the shore on the other side of the barn on the same line. It is unreasonable to suppose that he would have a road belonging to his property and wholly fenced out from his property. He must have been assuming that the fence was the line of his ownership.

Russell, J.

Possibly the plaintiff's occupation would not be so exclusive as to give him the land on which the road runs if he depended on that occupation alone, though it is very difficult to draw any line at which his occupation ceased, if we believe that he and his relatives built the road and that the defendant had nothing to do with the building of it, which I incline to think is the weight of the evidence.

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But I should not feel clear enough about the matter to differ from the learned trial Judge if the case depended on this point. I think the evidence as to what took place on the survey is very strong. It seems to have been present to the minds of all the parties that the line between Hubley and defendant was but a continuation of the line between plaintiff and defendant. Defendant admits that he asked plaintiff to be present when this line was run and he gives the reason: "It was because he wanted him to see the line run between him (that is the defendant) and the Hubleys." I think it is not going too far to say that on that occasion, he and plaintiff were agreeing to the line so determined as the line between themselves. I mean, of course, that they were agreeing to this point, thus fixed and settled as the starting point of the line bounding the defendant's property, and this is the line of the fence up to which the plaintiff is claiming.

They were all then present for the purpose of ascertaining this point and plaintiff who was brought there by the defendant, or rather sent for by the defendant, had no other reason for being there than that of settling the line between himself and the defendant, although, primarily, of course the purpose of the survey was to settle the line between Hubley and the defendant.

The interpretation of the deed presents a difficult question. If the view I have taken of the evidence is correct it is not necessary to interpret the deed.

The difficulty is as to the meaning of the words descriptive of the course running from the end of the second fence, "thence northwest two chains to a cross road that goes or leads to the Halifax and Chester road which the aforesaid (grantor) is to have and to hold and doth reserve for himself his heirs, executors and assigns forever; from thence to go northwest four chains and fifty links, etc." The question is whether these four chains and fifty links are to be measured from the end of the preceding course, or from the northwestern side of the road so reserved.

I think that if it had been intended to run this distance from the farther side of the road the draughtsman would have felt it necessary to state the width of the road. But irrespectively of this difficulty it seems to me to be the natural reading of the description to understand this third or fourth course, whichever it may be considered, as beginning at the end of the preceding course, and not at the opposite side of the road reserved. If the deed is read in this way it carries the defendant's land only to the fence and the line of the barn as plaintiff claims, and that I think is the proper way to read it.

Appeal allowed.

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Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, and Cameron, JJ.A. June 10, 1912.

June 10.

1. PARTNERSHIP (§ I—3)—WHAT CONSTITUTES—FAILURE TO BRING IN ANY CAPITAL—ABSENCE OF WRITTEN CONTRACT—DIVISION OF OPINION.

The relationship of master and servant only was shewn and no partnership was established between the parties, in an action for an accounting of a partnership claimed to have been entered into by the plaintiff and the defendant, where the plaintiff alleged that it was verbally agreed (1) that he should contribute a certain amount of money and the defendant a much larger sum and that each could draw a specified amount on account of his share of the profits and failed to state that any of these things were done except that he, the plaintiff, received out of the business a sum for five months equal to the amount stipulated to be drawn out of the profits under the agreement, and his own evidence shewed that he afterwards drew up an agreement in writing in the terms he desired it to be signed by him and the defendant, in which it was stated that he was to contribute, not the sum in cash mentioned in the written agreement, but only half thereof and a note for the balance to be paid out of his earnings from the business; (2) that his salary was to be a certain sum per month which was equivalent to the sum drawn by him as aforesaid; (3) that each party "was to draw a salary of——," but whether on account or exclusive of profits was not shewn; (4) that the parties agreed "to produce satisfactory agreement drawn up in legal form upon the . . [plaintiff] producing such cheque with note to be signed as agreed," and the testimony given by the plaintiff himself shewed that after the verbal agreement was entered into and before he drew up the formal agreement aforesaid, he refused, when he arrived at the city where the business was to be carried on, though he went to work in the business, to surrender the cash and note unless a contract in writing was drawn up.

Statement

APPEAL from decision of Robson, J., on the trial of the action for an account of an alleged partnership. By the judgment appealed from the action for an account was dismissed on a finding by the Court that there was no partnership, but a reference was directed to ascertain what the plaintiff should receive for his services.

The appeal was dismissed on an equal division of opinion in the Court of Appeal but without costs.

Messrs. *R. M. Dennistoun, K.C.* and *C. H. Locke*, for plaintiff.

F. J. G. McArthur, for defendant.

HOWELL, C.J.M., concurred with CAMERON, J.A.

Howell, C.J.M.

RICHARDS, J.A.:—The question in this case is one merely of fact, as I see it. The evidence, I think, shews that the plaintiff and defendant did actually, while in Milwaukee, and before coming to Winnipeg, enter into an agreement of partnership, and that they would, in fact, have then had its terms put in writing, but that the witness Lesser persuaded them that, as the partnership was to be carried on in Manitoba, it would be better to have the writing drawn in Manitoba.

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The terms of the partnership were, as I understand the evidence, that the capital of the partnership should be the total sum that the business should, after it had become established, or become a failure, be found to have then cost, and that, if a success, the plaintiff's interest in the business and its profits (if any) should, as against the defendants, be the proportion that $1,500 should be found to bear to the balance remaining of the above total sum, after deducting $1,500 therefrom.

Though the above proportions were in fact unknown when the agreement was made, they were capable of being definitely ascertained after the business had become established or a failure, so that the agreement does not seem incomplete because of uncertainty as to the individual interests of the partners.

If the business had been a failure, then I think the terms agreed on would have made the plaintiff, as between him and the defendant, liable to contribute towards the loss in the proportion that $1,500 bore to the balance of the total sum put into the venture, after deducting $1,500 from that total.

The actions of both parties shew, in my opinion, that they fully understood the terms to be as above. They came to Winnipeg in pursuance of their verbal agreement, and started the business. Except as to the payment in of his cash contribution and the giving of his note, the plaintiff did, in the carrying on of the business, exactly what it had been agreed in Milwaukee that he, as a partner, should do. It is not pretended that the plaintiff went into it under any contract of hiring, or agreement to be paid merely for his services.

It is true that the plaintiff did not put in the $750 that he agreed to put in in cash, or give the note for $750, that he was to give. But the defendant's refusal, or delay, to enter into written terms, as had been agreed between them, really, I think, caused the plaintiff's delay so to do. In any event, he could, in the taking of accounts, be charged with those sums, with interest.

There are several circumstances any one of which, taken singly and without reference to the other matters in evidence, would be strong evidence for, or against, the plaintiff's contention. But the evidence as a whole, and particularly the petition for incorporation which the defendant caused to be prepared, seems to point to the defendant having recognized, and been prepared to admit, the plaintiff's claim that he was, in fact, a partner in the business.

I would reverse the finding of the learned trial Judge, and declare the existence of the partnership. As that finding, however, stands, because of this Court being evenly divided, as to allowing, or dismissing, the appeal, it is not necessary here to go into the working out of the judgment that I think should be pronounced.

PERDUE, J.A.:—The evidence clearly shews that the defendant offered the plaintiff in Milwaukee a partnership in the business, the defendant contemplated commencing in Winnipeg, under the name of "The Bowes Dairy Lunch." This offer was accepted by the plaintiff. He gave up a situation in which he was earning $100 a month and had the promise of $125 a month if he would remain, came to Winnipeg about the end of January, 1911, helped to organize and open the business and gave all his time to it until 7th July, 1911. The terms of the intended partnership, as arranged in Milwaukee, are proved by the plaintiff and by Lesser, who was present at the interview between the parties when the terms were agreed on. Lesser's evidence as to the agreement shews that Hallvorson was to have a $1,500 share in the business and was to participate in the profits in the proportion which $1,500 would bear to the balance of the cost of establishing the business. It was expected this cost would be $6,000 or $7,000, but not over $9,000. Of the $1,500, Hallvorson was to pay $750 in cash and give his note for $750. Bowes was to supply the rest of the capital. Lesser advised the parties not to put the agreement in writing while in Milwaukee, for fear it might not comply with the laws of Manitoba, and to wait until they got to Winnipeg where the formal agreement could be made.

The defendant corroborates the evidence of the agreement made in Milwaukee. He says: "I told him if he wanted to go in with me I would give him $1,500 interest for $750 and give me a note for $750 and let the business pay the other $750 and he said it was all right." It was further arranged that the plaintiff was to draw $75 a month and the defendant $150 a month on account of profits.

In accordance with the above arrangement the plaintiff gave up his situation and came to Winnipeg, arriving here about the end of January. He immediately set to work to help the defendant get the business of the Bowes Dairy Lunch organized and put in operation. From the time he arrived until 7th July, the plaintiff appears to have given all his attention to the business. The lunch room appears to have been kept open all night and the plaintiff took charge of it from 7.00 o'clock in the evening until 7.00 o'clock in the morning. He states that up to 1st June he worked fifteen to eighteen hours a day.

When the plaintiff arrived in Winnipeg he had with him his $750. The defendant asked him for the money intending to put it in his own private account. The plaintiff objected to this until their agreement was put in writing. The defendant said: "All right, we will fix it up in the next day or two." Although spoken to on several occasions by the plaintiff and urged to have the partnership articles drawn up and signed,

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the defendant evaded this and no written articles were signed. In the meantime the plaintiff retained the $750, in cash and never gave a note. The evidence shews that the plaintiff's services were the main thing the defendant desired to secure, and these were given in the fullest manner. Defendant admits he did not require the plaintiff's $750. It is easy to surmise why the defendant kept putting the plaintiff off after the business was started, and refusing to sign any partnership agreement. The business from the very outset proved to be a phenomenal success. The receipts were $80 at the first meal and the daily receipts went as high as $527. The defendant evidently considered the business so valuable that he determined to exclude the plaintiff, if he could, from any interest in it. This is the view I take of his conduct as disclosed in the evidence.

On one occasion the defendant told the plaintiff that he, the plaintiff, was making from 150 to 200 per cent. on his money. As further proof of the fact that the parties were working together as partners it was shewn that the defendant introduced the plaintiff to the bank manager and to another person as his partner. In June a petition for incorporation of the business under the Joint Stock Companies Act was prepared at the instance of the defendant and was signed by both him and the plaintiff. The petition shews on its face that the capital stock was to be $10,000 of which the plaintiff was to have $1,500 and this was declared paid by the plaintiff by his "transfer of interest of assets and good-will of Bowes Dairy Lunch, Winnipeg." The defendant changed the amount of the proposed capital from ten thousand, as at first agreed, to thirteen thousand dollars, giving an additional three thousand dollars to his wife. The plaintiff and he had a disagreement, in reality over another matter, and the plaintiff left.

The learned trial Judge has found that the parties became of one mind in Milwaukee, that a partnership should be formed, but that the intention was that a formal writing setting out the terms should be made. He takes the view that in the absence of the "intended formal agreement and no contribution of capital, as was essential," there was no concluded contract between the parties.

Now, "partnership" is defined by section 4 of the Partnership Act as "the relation which subsists between persons carrying on a business in common, with a view of profit." The comment by the authors of Lindley on Partnership, upon this definition is: "It is not always easy to determine whether an agreement amounts to a contract of partnership or only to an agreement for a future partnership. If the parties to the agreement have begun to carry on business, although prematurely, they will be partners"; Lindley on Partnership, 7th ed., pp. 15, 16.

Where there has been a part performance by the parties actually engaging in business together with a view to profit, this in itself constitutes a partnership. This is the case although the parties contemplate signing a formal partnership deed and never sign it: *Sycrs* v. *Sycrs*, 1 A.C. 174. The question in such a case is not, when was the agreement executed? but rather this, when did the partners commence to carry on business on their joint account? See Lindley on Partnership, 7th ed. p. 731, and *Battley* v. *Lewis*, 1 M. & G. 155. The latter case shews that where parties acted as partners but the partnership deed was not executed until afterwards, they were to be regarded as partners from the time when they acted together as such.

In *England* v. *Curling*, 8 Beav. 129, three persons agreed to become partners and signed, in initials, a draft agreement for a partnership. A deed was prepared to carry into effect the terms of the agreement, which underwent some alterations, but was never executed. The parties, however, commenced to carry on the business together. A decree for specific performance of the partnership was granted. Lord Langdale, M.R., said:—

> With respect to a partnership agreement, it is to be observed, that all parties being competent to act as they please, they may put an end to or vary it at any moment; a partnership agreement is therefore open to variation from day to day, and the terms of such variations may not only be evidenced by writing but also by the conduct of the parties in relation to the agreement and to the mode of conducting their business. Partners, if they please, may, in the course of the partnership daily come to a new arrangement, for the purpose of having some addition or alteration in the terms on which they carry on business, provided those additions or alterations be made with the unanimous concurrence of all the partners.

In that case, it being uncertain what were the actual terms of the partnership, a reference was directed to the Master to ascertain what these items were and to settle a deed of partnership in accordance with them. See also Partnership Act (Man.) section 22.

In the present case it has been shewn that the terms of the partnership were agreed upon in Milwaukee, that the plaintiff came to Winnipeg in pursuance of that agreement and that the parties did actually commence business and work together with a view to profit. The plaintiff was either a partner of the defendant or was simply the hired servant of the latter. It is impossible to believe that the plaintiff left his home, gave up his situation in Milwaukee where he could earn $125 a month and come to Winnipeg in order to work fifteen hours a day for the defendant at $75 a month. The trial Judge very properly disbelieved the defendant's evidence as to a hiring and directed that plaintiff should be paid for his services on a *quantum meruit*.

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This necessarily implied that the relationship of master and servant subsisted between the parties, a conclusion which, in my opinion, is not warranted by the facts.

With deference, I do not agree with the finding of the learned trial Judge that the payment of the $750, by the plaintiff was essential to the formation of the partnership. If the parties commenced to do business in common with a view to profits, as I think the evidence clearly establishes, the failure of the plaintiff to contribute the capital agreed to be contributed by him did not cause him to cease being a partner. He was chargeable with the capital he should have contributed and liable to pay interest on it, but he was, nevertheless, a partner: Partnership Act (Man.) section 27 (*c*) and section 47; *Venning* v. *Leckie*, 4 East 20; *Nowell* v. *Nowell*, 7 Eq. 538.

It appears to me that the evidence in this case leads to one conclusion, that the plaintiff and defendant were partners at will in the business from the time they commenced to work together until the plaintiff left. The terms were those agreed upon in Milwaukee. The plaintiff had a $1,500 interest in a business whose capital was not to exceed $9,000. The plaintiff did not pay in his $750 in cash and give his note, but delay in doing this was permitted by a mutual agreement that when the formal articles were prepared and signed the money and note would be given. The plaintiff's share for the assets and profits should, therefore, be charged with the $1,500 he agreed to contribute as capital and interest on that sum at the legal rate. Any sum advanced to the business by the defendant in excess of the portion of the capital he was to advance should be repaid to him out of the assets with interest at the legal rate. In other respects the usual judgment should be pronounced to wind up the partnership and distribute the assets, unless the parties agree on the amount to be paid to the plaintiff.

I think the defendant should pay to the plaintiff the costs in the Court of King's Bench up to and including the trial and also the costs of this appeal. The costs of the reference to the Master should be reserved to be dealt with by the presiding Judge at the hearing on further directions.

Cameron, J.A.

CAMERON, J.A.:—This action is brought to take the accounts of a partnership between the plaintiff and defendant as restaurant keepers, which partnership the statement of claim alleges "was undertaken on the 23rd day of January, 1911, and continued until Friday, the 7th day of July, 1911, when the same was terminated." It is further alleged that it was agreed that the plaintiff should contribute $1,500 to the capital, and the defendant $6,500 and that each of the partners could withdraw $75 per month on account of his share of the profits. It is not alleged, however, that these things were done except that it is

stated that the plaintiff received $75 a month for five months. The statement of defence denies these allegations and says that whatever negotiations took place between the parties were never consummated.

The learned trial Judge dismissed the plaintiff's claim for an account, but pursuant to an amendment at the trial, directed a reference to the Master to ascertain the proper sum payable to the plaintiff for his services.

The contract alleged in the pleadings is certainly not that set up by the plaintiff in his evidence. The plaintiff was on his evidence to contribute not $1,500, but $750 and a note for $750, which was to be paid out of his earnings from the business. The defendant's contribution was to the amount it cost to establish the business in Winnipeg. The plaintiff says (p. 14): "To erect it he said it would cost something like six or seven thousand dollars, but we didn't think it would run over nine thousand dollars, but we thought there might be a possibility of it running to nine thousand dollars." There is nothing in his evidence about the $6,500, which the defendant was to contribute, according to the statement of claim, nor is there anything in his examination in chief with reference to the $75 to be paid to each of the partners monthly on account of profits. On cross-examination he states that he (the plaintiff) was to draw $75 a month and the defendant $150, but whether this was to be on account of profits or exclusive of profits does not appear.

Nowhere in the plaintiff's evidence do I find any statement that the amount expended by defendant in establishing the business had been ascertained as a basis for the partnership agreement. He says Bowes told him it amounted to about $13,000, but this was for the purposes of the proposed incorporation to which the plaintiff says he never really acceded, though he signed the petition for incorporation. There was no time fixed during which the partnership should continue, nor any definite time when it should commence, except that the plaintiffs says it was to begin as soon as he came to Winnipeg (p. 30).

According to the plaintiff the question of a written agreement was brought up at Milwaukee (the former residence of the parties) in the presence of Mr. Lesser, a friend of both. He (the plaintiff) says (at p. 15):—

> I said it was hardly fair to ask me to leave the employment of the United States Gypsum Company without something to shew what I was doing. I wanted to see this thing in such form that I would have something in black and white, and Mr. Lesser interrupted and said, "It is a question of whether it is advisable that you should go into this that way, any partnership you form down here might not be legal in Manitoba because it would be legal here, and consequently it is best for you to wait until you get to Winnipeg and have it fixed up."

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Q. Have what fixed up?

A. The partnership, to have it put in legal form, and that was the understanding.

The plaintiff came to Winnipeg, bringing with him his $750 and, on arrival, met the defendant, who took him to the Traders Bank. The defendant there asked the plaintiff for the $750. To this the plaintiff replied (p. 16):—

Bert, that is all right, but you know what our agreement was down below, that as soon as I came up here the whole thing was to be put into shape and we had arranged down below that the money would be forthcoming.

Q. What did you mean by putting it in shape?

A. Putting it in good legal form, what we had agreed to down below.

The plaintiff came to Winnipeg January 23, and the business was started February 16.

He was asked and answered the following questions (p. 18):—

Q. Between those dates was anything said about the partnership?

A. I brought the matter up within a week or two after coming up here and he said, "Let us get our contracts made first so that we may know what it is going to cost us before we get into any agreement," and so I said nothing until after we opened up, and nothing was said to me.

The plaintiff never offered the defendant the money. "That question" he says at p. 21, "didn't arise until Sunday, June 4, when I informed him that unless he came down to what he had agreed to below so that I could have something to shew for the relations between us, that I would leave the business on the 15th." The plaintiff says the defendant then raised the question of the money, whereupon the plaintiff went to see his friend Mr. Bonnet, and between them they drew up the terms of the agreement as he says he understood them. The following is a copy of the document:—

Winnipeg, Man., June 5, 1911.

We hereby confirm verbal agreement entered into with Oscar Hallvorson in December last, 1910, in Milwaukee, Wisc., U.S.A., which is as follows:—(¼) One-quarter, or whatever interest his investment shall amount to in the establishment of the Bowes Dairy Lunch at 280 Portage Ave., Winnipeg, Man., in consideration of which the said Oscar Hallvorson agrees to put into the business cash to the amount of Seven Hundred and Fifty Dollars ($750.00) and note signed, with interest at (6 per cent.) six per cent., for Seven Hundred and Fifty Dollars, said note to be paid for out of the earnings of his said interest.

It is further agreed that his salary is to be at the rate of Seventy-Five Dollars per month ($75.00). Further that we are each to draw a salary of .....

Further, that the profits or earnings of the business are to be declared at least every six months, unless otherwise stipulated in legal form hereafter.

We further agree to produce satisfactory agreement drawn up in legal form upon the said Oscar Hallvorson producing said cheque and with note signed as agreed.

(Signed) _____

What is the contention on this appeal? It is not that set forth in the statement of claim. As I understand it, the contention presented to us is that the agreement in respect of which relief is asked, arrived at in Milwaukee, was that the plaintiff should invest in the business $1,500, $750 cash and a note for $750, to be paid out of the earnings; that the defendant should advance whatever it might cost to establish the business (which was to be his contribution); that the parties should draw profits in proportion to their respective contributions; that it was to be a partnership at will; that it was to commence on the plaintiff's arrival in Winnipeg, and that the parties were to draw $75 and $150 per month respectively, but whether on account of or exclusive of profits was not made clear to us. It is further contended that there is no uncertainty as to the amount of the respective shares as a reference to ascertain the cost of establishing the business can render the amount of the defendant's contribution, and therefore the respective proportions in which the parties were to share, certain. As to the written agreement to be drawn up, it is urged that that was simply for the purpose of setting forth in legal form what the parties had already fully and finally settled and determined at Milwaukee.

To deal with this last contention first. It certainly was not the view of the plaintiff. He was to put $750 cash into the business, but when he came to Winnipeg he refused to do this. He said the agreement was to be "put into shape" "into good legal form" before the money was handed over to the defendant. He subsequently (as pointed out above) acquiesced in the defendant's claim that they should find out the cost of the contracts "before we get into any agreement." From the time of the meeting in the Traders Bank until June 5, the plaintiff never offered his $750. When he drafted the agreement of June 5, which embodied his views of its terms, he put in the last clause the following:—

> We further agree to produce satisfactory agreement drawn up in legal form upon the said Oscar Hallvorson producing said cheque and with note signed as agreed.

I take the "We" to mean the defendant. Now this must surely shew that the formal agreement was more than merely reducing to writing terms already fully settled and determined. The plaintiff's view evidently was that his entering into the agreement at all was conditional upon a formal written agree-

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ment, satisfactory to himself, being exhibited to him. The execution by the parties of the agreement was to be a condition precedent to his handing over his $750. There was to be no partnership until the $750 was paid and no $750 was to be paid until there was a satisfactory agreement. It was never, it seems to me, at any time, in the contemplation of the parties that the plaintiff should have an interest in the business without the payment by him of the cash sum mentioned. Had he, however, paid over his $750 on his arrival it might have been difficult to resist the conclusion that the relation of partnership had arisen. But the plaintiff refused to make this payment on the express ground that it was part of the original agreement that a formal agreement had to drawn up, settled and signed before the payment was made.

An examination of the draft agreement of June 5, shews differences between it and the agreement alleged to have been entered into in Milwaukee. The provisions of the last two paragraphs are quite new. Moreover, the provision, "Further that we are each to draw a salary of . . . ," shews that then, on June 5, an important term was unsettled. And even if the figures had been inserted it would have been necessary to make it clear whether these salaries were included in or independent of profits.

Under the circumstances it seems to me impossible to hold on the evidence that there was any time when the terms of the alleged contract were agreed to, and the minds of the parties were at one.

If an incomplete or tentative or preliminary contract was entered into in Milwaukee, an agreement really to enter into a formal written contract when all the terms were finally settled, it might be argued that, when the plaintiff came to Winnipeg and took an active part in the business, the parties then, by their acts and conduct, rescinded such previous preliminary agreement to enter subsequently into a formal contract, and that they then did, in fact, enter into a new contractual relation with each other constituting a partnership in law. This is, however, not the partnership here as that partnership is alleged in the statement of claim nor is it the partnership as put forward on the argument before us, but it may be considered on the evidence as a possible ground for affording the plaintiff relief.

The parties were, of course, at liberty to throw overboard their previous negotiations and make a new contract if they so wished. If they did so, it would be for the Court to discover its terms. But, first of all, it is necessary to ascertain on the evidence whether such a new contractual relationship was in fact entered into by the parties after the plaintiff's arrival in Winnipeg.

In what capacity did the plaintiff regard himself as acting in the business from January 23rd until June 5th? Did he consider himself a partner or an employee? He evidently did not believe himself a partner for he did not secure that formal partnership agreement which he deemed necessary, and he did not pay, or offer to pay, his $750. He did not think, I take it, that he was entitled to draw dividends on an interest for which he was to pay $750 (or $1,500) when he had not paid in anything. During that period he asked for no division of profits, and suggested nothing about past profits in his draft agreement. He signed no cheques and exercised no control in the business other than that which might well, and of necessity, be given a subordinate.

There is no question that he expected, ultimately, more than the subordinate position he filled; that is to say, he was an employee who hoped or, possibly, had been led to believe that he might become a partner. He could have insisted upon a written agreement before he went to work, but he did not. And it may be said that he deliberately refrained from so doing and from imperilling his cash until he became certain of the success of the business, as it can also be said, on the other hand, that Bowes waited until success was assured before he decided to break off his relations with the plaintiff.

But we cannot enter, with accuracy, into the motives of the parties. We are confined to the evidence before us. When I examine the draft agreement of June 5, it seems to me that on the face of it, it refers to the future and that it was intended to speak from and after June 5. Nowhere is it retrospective; nowhere does it refer to the past except in the reference to the preliminary verbal agreement. It says, "whatever his interest shall amount to;" "which the said Oscar Hallvorson agrees to put into the business;" "his salary is to be at the rate of;" "we are each to draw;" "the profits are to be declared;" "We further agree to produce." These expressions shew that the plaintiff, so far as this document gives us information, did not consider himself a partner before June 5 or before the indefinite time referred to in the last clause. That is to say, he considered himself a person in the employment of the defendant who had previously agreed at some future time to enter into a partnership relationship with him, provided an agreement satisfactory to both of them could be arrived at. And that then and not until then a partnership was to arise and his $750 to be payable.

What was there in the conduct of the defendant that would lend colour to the assertion that he considered the plaintiff a partner in his business? The defendant asked the plaintiff for the $750 when he arrived,—"he asked me to deposit my money

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in his account." Had the plaintiff acceded to this request and produced his promissory note for the $750 additional, I think the question would, in all probability, have been then settled. But the plaintiff refused to hand over his $750. That the defendant afterwards spoke of him as his partner (as is alleged) is not a matter to which, in my opinion, importance can be attached. It is a word of wide popular use and its use on such occasions as are mentioned in the evidence is not necessarily significant of legal consequences.

Outside of these incidents (which are not admitted by the defence) I can find no facts alleged that go to shew an intention on the part of the defendant to take and hold the plaintiff as a partner. I would say, rather, that the plaintiff's own evidence is to the effect that he, the defendant, treated him, the plaintiff, after January 23, as his subordinate, and not as his co-partner, in the business.

In this case it is for the plaintiff satisfactorily to establish the facts on which he claims to be entitled to relief. I think he has failed in this. He has not shewn a concluded agreement as alleged in his pleadings or on this argument, and he has not shewn such acts and conduct on the part of the defendant and himself as, independently of the agreement alleged to have been arrived at in Milwaukee, would have pointed clearly to the conclusion that the parties had, after his arrival in Winnipeg, entered into a new contract of partnership entitling him to recover in this or any other action.

I think the judgment appealed from should be affirmed and the appeal dismissed.

Appeal dismissed by divided Court.

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S. C.
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Sept. 3.

HEALEY v. CORPORATION OF VICTORIA.

British Columbia Supreme Court, Murphy, J. September 3, 1912.

1. INJUNCTION (§ I 1—78*a*)—EMINENT DOMAIN—APPOINTMENT OF ARBITRATOR—FIXING COMPENSATION FOR WATER WORKS PURPOSES—WHEN INTERLOCUTORY INJUNCTION WILL BE GRANTED.

Where an order appointing an arbitrator for the purpose of assessing compensation under the Victoria Water Works Acts has been made by a judge of the Supreme Court, an interim injunction to restrain such arbitration will not be granted upon the motion of the municipality in the absence of evidence that the municipality is likely to suffer damages if the arbitration proceeds.

Statement

AN application for an interim injunction to restrain arbitrators appointed for the purposes of assessing compensation payable under the Victoria Water Works Acts from proceeding with the arbitration, a suit having been commenced seeking a declaration that the city was entitled only to a portion of the land in respect of which the water commissioner had given notice of expropriation to the owner.

The application was dismissed with costs.

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Argument

McDiarmid, for the municipality (applicants):—At the beginning of the year 1911 a by-law ratified by the people was passed by the council authorizing the carrying out of the necessary work for the purpose of bringing water from Sooke Lake to supply the city and the scheme evolved in pursuance of the by-law included the expropriation of certain property of the area of about thirty square miles round Sooke Lake from mountain top to mountain top. On the 10th June, 1911, the water commissioner gave notice to Mr. Healey and to every person whose land approached on the lake and in Mr. Healey's case the notice referred to three lots containing about three hundred and forty acres, and Mr. Healey claims compensation amounting to $166,000. It was discovered in March last that less land was required than had been stated in the notice given to Mr. Healey, and it is insisted on behalf of Mr. Healey that the city has expropriated all the property mentioned in the notice. Gregory, J., on an application for the appointment of an arbitrator, held that the city must take all the land referred to, and appointed an arbitrator. On the question being taken to the Court of Appeal, that Court held that it had no jurisdiction to review the decision of Gregory, J., as he was *persona designata*. The arbitrators met and a writ was issued in this action, and this is an application for an interim injunction to restrain them from proceeding with the arbitration. A settlement has been discussed between the parties, but the council refused to accept the terms. The arbitrators propose to proceed with the arbitration to-morrow. We contend that this case is not *res judicata* as upon an application for the appointment of an arbitrator any question as to the legality of the subject-matter could not be enquired into. The land required by the city consists of ninety-six acres in addition to two acres at the foot of the lake, and this is the area limited to the city for the purposes for which it is required, and the city has no power to expropriate more. We are asking for an injunction until the question can be tried. It will be a waste of money, time and energy to proceed with the arbitration, and we will undertake to go to trial immediately, and to pay any damages which Mr. Healey may be held to have suffered.

Davie, contra, not called upon.

MURPHY, J.:—There is a decision of one of my brother Judges that the matter should go to arbitration. The city must shew that it is likely to suffer damages. The application is dismissed with costs to the defendant in any event.

Murphy, J.

Application dismissed.

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Aug. 31.

STRICKLAND v. ROSS et al.

Saskatchewan Supreme Court, Trial before Wetmore, C.J. August 31, 1912.

1. SPECIFIC PERFORMANCE (§ I E 1—30)—CONTRACT FOR SALE OF LAND—STATUTE OF FRAUDS—INTENTION OF PARTIES—QUESTION OF FACT—FORMAL AGREEMENT—OTHER MATERIAL TERMS.

Where the Statute of Frauds is pleaded in an action for specific performance of an agreement for the sale of land, the question raised is really one of fact as to the intention of the parties; if their intention was that the existing writing should contain the whole agreement, and nothing more was contemplated than is expressed therein, the statute affords no defence, notwithstanding that it was intended that a more formal agreement should be drawn up subsequently; but, if it was contemplated that such formal agreement should include material provisions not contained in the existing writing, the statute is a good defence, because a memorandum, to satisfy the statute, must contain the whole of the terms agreed upon.

2. CONTRACTS (§ I E 5—97)—STATUTE OF FRAUDS—CHEQUE AND RECEIPT—SUFFICIENCY OF WRITINGS—SUBSEQUENT FORMAL AGREEMENT WITH ADDITIONAL TERMS CONTEMPLATED.

Where an alleged agreement for the sale of land is contained in a cheque and receipt, and it appears in an action for specific performance thereof that a more formal agreement was to be prepared, providing for payment of taxes, cancellation on default, transfer of the property, and other important matters not mentioned in the cheque and receipt, the cheque and receipt do not constitute a sufficient memorandum in writing of the agreement to satisfy the Statute of Frauds.

[*Green* v. *Stevenson*, 9 O.L.R. 671, followed; *Harris* v. *Darcock*, 1 Sask. L.R. 116, distinguished.]

Statement

THIS is an action:—

(*a*) For a declaration that an alleged agreement between the plaintiff and the defendants dated 25th January, 1911, for the sale by the defendants to the plaintiff of lots 6 and 7 in block 176, plan Q.3 of the city of Saskatoon for the price of $7,500.00 is in force.

(*b*) The specific performance by the defendants of such agreement on the plaintiff paying to the defendant Ross $3,400.00 and entering into an agreement to pay the balance at the time agreed upon between the parties.

(*c*) An injunction restraining the defendants from selling, mortgaging or otherwise disposing of the property.

(*d*) Damages.

The action was dismissed with costs, and an order made removing the caveat.

G. A. Cruise, for the plaintiff.
P. E. Mackenzie, for the defendant.

Wetmore, C.J.

WETMORE, C.J.:—Lot 7 was owned by the defendant Ross, lot 6 by the defendant Donaghue, and Ross had a power of attorney from Donaghue.

The plaintiff is a married woman and the negotiations on her part were carried on by her husband Chumley E. Strickland, who was authorized to act for her. It was not questioned that Strickland had full authority from her to do all that he did do in

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reference to the matters now in question. The evidence in the case is in many respects very conflicting. I find the following facts:—

The defendant Ross and Strickland met on the 25th January, and the matter of acquiring these two lots was discussed between them. It resulted in Strickland giving Ross a cheque of the Builders' Supplies Agency (which was Mrs. Strickland) and such cheque is as follows:—

Saskatoon, Sask., Jan. 25th, 1911.

To the Traders Bank of Canada,

Pay to S. R. Ross [the printed word bearer was here struck out] ($100.00) One hundred (00/100) dollars deposit on lots 6 and 7, B. 176, Q3.

$3,500.00 cash balance 6 and 12 mon. and ag. int. at 8 per cent.

Price $7,500.00. THE BUILDERS SUPPLIES AGENCY.

Per pro. G. M. Strickland.

C. E. Strickland.

P/Atty.

and Ross wrote and signed a receipt of which the following is a copy:—

Jany. 25th, 1911.

Received of G. M. Strickland one hundred dollars ($100.00) deposit lots 6 and 7, block 176, Q 3. Price, $7,500.00. $3,500.00 cash, balance of first payment to be made on or before first of February.

S. R. Ross.

The testimony on behalf of the defendants was that this transaction was merely an option to the plaintiff up to the 1st February to take this property, and that that was understood to be the effect of it between Ross and Strickland. Strickland on the other hand denied this utterly and testified that the transaction was an agreed sale between the defendants and the plaintiff.

I have no difficulty in coming to the conclusion that taking the cheque and receipt together, they, as far as they went, constituted an agreement for the sale of the property, and that being so, it cannot be permitted that such written agreement can be varied or altered by a verbal understanding. If parties reduce their agreements to writing they are supposed to state what they intend and cannot be allowed, having expressed one thing, to successfully set up that by a verbal arrangement they intended another, unless of course they have made a mistake, and in that case they may apply to the Courts to rectify it, which the Courts under certain circumstances will do.

It was also urged that the plaintiff through her agent consented to the defendants selling the property to another person, and abandoned the arrangements made with them. There was evidence to that effect on the part of the defendants, but it was contradicted by the evidence on the part of the plaintiff. Possibly this judgment may be appealed, and for the benefit of the

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Court of Appeal I may state that the evidence does not satisfy me that Strickland did so consent. I think his conduct, especially his lodging a caveat under the circumstances in which he did it, was quite inconsistent with his so consenting.

The defendants pleaded the Statute of Frauds, and I hold that under that plea and the evidence they are entitled to succeed in this action. Do the writings (the cheque and the receipt) contain the whole intended agreement between the parties? If they do then the agreement is not affected by the statute; if they do not then the provisions of the statute are not complied with. The result of the decisions on such a question appears to me to be to the effect that the question resolves itself into a question of fact, what was the intention of the parties? If the intention was that the writing contained the whole agreement and nothing more was contemplated than what is expressed therein, then the agreement is binding and the Statute of Frauds does not affect it, and that notwithstanding it was contemplated that a more formal agreement should be drawn up, because the formal agreement would not carry the arrangement between the parties beyond what the original writing provided. But if it was contemplated that another and say more formal agreement should be drawn up and executed which was to include material provisions not contained in such original writing, then that original writing would not be binding under the statute, because an agreement for the sale of lands to be binding under that statute must contain the whole of the intended agreement. Strickland testified in effect that it was understood at the time the agreement sued on was signed that a formal agreement was to be prepared providing among other things for payment of taxes, cancellation, and for transfer of the property. I understand by this that the formal agreement was to provide when and under what circumstances the sale might be cancelled, and when the plaintiff would be entitled to a transfer, and who should pay the taxes on the land and from what date, all of them matters of great importance and which would likely be given great consideration. This I think brings the case within what was decided in *Green* v. *Stevenson*, 9 O.L.R. 671, which I think was well decided and which I follow. I do not wish to be understood as attempting to overrule or dissent from the judgment of my brother Johnstone in *Harris* v. *Darroch*, 1 Sask. L.R. 116. The facts in that case were in my opinion entirely different from those in this.

There will therefore be judgment dismissing this action with costs, and there will be an order directing the registrar of land titles to remove the caveat lodged in the land titles office by the plaintiff against the lands in question.

Action dismissed.

HOWSE v. TOWNSHIP OF SOUTHWOLD.

ONT.

H. C. J. 1912

May 20. July 11.

Ontario High Court, Middleton, J., in Chambers. May 20, 1912.

Ontario Divisional Court, Falconbridge, C.J.K.B., Britton and Riddell, JJ. July 11, 1912.

1. MUNICIPAL CORPORATIONS (§ II G—205*a*)—LIABILITY FOR DAMAGES—POLE ON STREET—ERECTION BY TELEPHONE COMPANY WITHOUT AUTHORITY R.S.O. 1897, CH. 223, SEC. 606, SUB-SEC. 1.

The only liability upon a township for injuries to a person caused by a collision while driving on a highway in a township with a pole erected upon the highway, not by the municipality but by a telephone company which had no statutory or other right to erect poles upon the highway, is that imposed by sub.-sec. 1 of sec. 606 of the Municipal Act, R.S.O. 1897, ch. 223, making municipal corporations civilly responsible for all damages sustained by any person through the municipality's negligent failure to repair the highway by removing the pole.

2. HIGHWAYS (§ IV A 4—147*f*)—LIABILITY OF MUNICIPALITY—OBSTRUCTION IN STREET—TELEPHONE POLE—R.S.O. 1897, CH. 223, SEC. 606.

An action against a township for injuries received by a person colliding with a pole erected upon the highway by a telephone company who had no statutory or other right to do so falls within sub-sec. 1 of sec. 606, of the Municipal Act, R.S.O. 1897, ch. 223, and must be brought within three months after the damage has been sustained as required by such section.

3. HIGHWAYS (§ IV A 4—147*f*)—LIABILITY OF MUNICIPALITY—NON-FEASANCE—MISFEASANCE.

The negligent failure of a township to remove a pole erected in the highway by stranger is a non-feasance not a misfeasance.

4. MUNICIPAL CORPORATIONS (§ II A—34)—POWER TO AUTHORIZE USE OF STREET—ERECTION OF TELEPHONE POLES—RESOLUTION OF COUNCIL.

A resolution of a township council is not an authorized municipal method granting a telephone company the privilege under certain conditions of constructing its telephone line, a by-law being necessary. (*Per* Middleton, J.)

Statement

ACTION brought by Barnum Howse against the Municipal Corporation of the Township of Southwold to recover damages for injuries sustained by the plaintiff by coming in contact with a telephone pole erected upon a highway in the township.

A case was stated by the parties as follows:—

"It appearing from the pleadings that there is a question of law involved in this action, which it would be convenient to have decided before trial of this action, the following case is stated in order that that question may be determined.

"1. This action was not commenced within three months after the damages complained of in the plaintiff's statement of claim, and the defendants, by their statement of defence, contend that the plaintiff's right of action, if any, is barred as against them by sec. 606 of the Municipal Act.

"2. The telephone pole referred to in the plaintiff's statement of claim was erected in the year 1906, by the Southwold and Dunwich Telephone Association Limited, a company incorporated under the Co-operative Companies Act, R.S.O. 1897,

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ch. 202, for the purpose of constructing and operating a telephone line, the declaration of incorporation under the said Act being dated the 24th day of September, 1906, and filed in the registry office for the county of Elgin on the 20th day of December, 1906.

"3. No by-law of the defendant township was ever passed permitting or regulating the erection or maintenance of the poles of the said company, but a resolution of the council of the defendant corporation was passed on the 5th day of March, 1906, in the words following: '*That this Council grant the Southwold and Dunwich Telephone Company the privilege of constructing their telephone lines, as long as they do not cause or have any obstruction in or on the roads and highways of this township.*'

"4. The pole in question is situated on the north side of the highway, as shewn upon the plan made by one Farncomb, C.E., annexed hereto, which plan, for the purpose of this motion, is admitted to correctly shew the *locus in quo*.

"The question for the opinion of the Court is, whether the plaintiff's right of action, if any, is barred by reason of the action not having been commenced within three months, as required by sec. 606 of the Municipal Act."

J. D. Shaw, for the plaintiff.
Shirley Denison, K.C., for the defendants.

Middleton, J.

May 20, 1912. MIDDLETON, J.:—A question of law argued, by consent of counsel, before the trial of the action, upon a stated case.

On the 27th June, 1911, the plaintiff, while driving along the north branch of the Talbot road, near the village of Shedden, came in contact with a telephone pole erected upon the highway, and was injured. The telephone pole was erected in the year 1906, by an association incorporated under the Co-operative Companies Act, R.S.O. 1897, ch. 202 (now repealed). This company had no statutory or other right to erect poles upon the highway.

A resolution of the township council was passed on the 5th March, 1906, in the words following: "That this council grant the Southwold and Dunwich Telephone Company the privilege of constructing their telephone lines, as long as they do not cause or have any obstruction in or on the roads and highways of this township."

This resolution, it is to be observed, does not purport to authorise the erection of any pole upon the highway. Moreover, a resolution is not an authorised method of municipal action. A by-law is necessary.

The Municipal Act, R.S.O. 1897, ch. 223, conferred upon councils of cities, towns, and villages the power of regulating by by-law the erection and maintenance of electric light, telegraph and telephone poles and wires within the municipal limits. See sec. 559, sub-sec. 4. This provision was carried forward unchanged in the revision of 1903; and it was not until 1906 that townships first received any authority to deal with the erection of poles and wires upon highways, when the statute was amended by 6 Edw. VII. ch. 34, sec. 20. This statute came into force on the 14th May, 1906, more than two months after the passing of the resolution in question; so that, in whatever way the resolution is looked at, it appears to be entirely invalid.

This action is unfortunately not brought within the time limited by sec. 606 of the Municipal Act, and so cannot be maintained if the municipality is only liable by reason of its failure to discharge its statutory duty to keep the highway in repair. In other words, the plaintiff, to succeed, must establish misfeasance, and not nonfeasance.

I have not been referred to any case which would justify me in holding that the mere failure to remove an obstruction placed upon the highway by a third person constitutes misfeasance. In Judge Denton's very careful review of the cases (Denton on Municipal Negligence, pp. 28 to 31), it is stated that where the obstruction is placed upon the highway by a stranger, and not by the corporation, the omission of the municipality to remove the obstruction, where there has been a sufficient period of time to justify a finding of negligence against the corporation, constitutes mere nonfeasance, and the action is governed entirely by the provisions of sec. 606. With this I agree.

Atkinson v. *City of Chatham* (1899), 26 A.R. 521, though reversed on another ground in the Supreme Court, places the liability of the municipality substantially upon this ground.

Pow v. *Township of West Oxford*, (1908), 11 O.W.R. 115, 13 O.W.R. 162, is much relied upon by the plaintiff. I do not think it turned at all upon the question which is now to be considered, but rather upon the question whether the municipality, in the light of the agreements and legislation therein referred to, remained responsible for that portion of the highway occupied by the railway. The action was brought within the statutory time; and, unless this legislation had relieved the municipality from its duty to repair, nonrepair was abundantly made out. The fact that the condition of nonrepair was caused by the erections of a third party was in itself quite immaterial.

I rest my decision entirely upon the ground that there is no liability on the part of municipalities arising from the placing of obstructions upon the highway by third parties, save the liability arising from the failure to repair imposed by sec. 606.

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Argument

So holding, I answer the question submitted by finding that the plaintiff's right of action, if any, is barred by reason of the action not having been brought within three months; and it follows that the action must be dismissed, with costs if demanded.

The plaintiff appealed from the judgment of MIDDLETON, J. The appeal was dismissed.

J. D. Shaw, for the plaintiff. The plaintiff should be allowed to proceed with his action. The resolution of the council of the 5th March, 1906, made the defendants liable. Nor can they escape liability by telling the company that they must not obstruct the highway. Of course, misfeasance must be established: *Atkinson* v. *City of Chatham*, 26 A.R. 521. I submit that the telephone company were licensees of the municipality: Denton on Municipal Negligence, pp. 30, 31, 228; *Cohen* v. *Mayor, etc., of New York* (1889), 113 N.Y. 532; *Croft* v. *Town Council of Peterborough* (1855), 5 C.P. 35; *Nevill* v. *Township of Ross* (1872), 22 C.P. 487; *Lewis* v. *City of Toronto* (1876), 39 U.C.R. 343; *Howarth* v. *McGugan* (1893), 23 O.R. 396; *Rowe* v. *Corporation of Leeds and Grenville* (1863), 13 C.P. 515; *Keech* v. *Town of Smith's Falls* (1907), 15 O.L.R. 300; *Pow* v. *Township of West Oxford*, 11 O.W.R. 115, 13 O.W. R. 162; *Biggar* v. *Township of Crowland* (1906), 13 O.L.R. 164.

[RIDDELL, J., referred to *Borough of Bathurst* v. *Macpherson* (1879), 4 App. Cas. 256, cited in *Brown* v. *City of Toronto* (1910), 21 O.L.R. 230.]

Shirley Denison, K.C., for the defendants. The township council had no power to allow the company to build on the highway; and in any event the council did not do so. The council could not proceed upon a resolution: a by-law would be necessary; the one is governmental, the other legislative: *Foster* v. *Reno* (1910), 22 O.L.R. 413, at p. 416; *In re Morell* v. *City of Toronto* (1872), 22 C.P. 323, cited in Biggar's Municipal Manual, p. 354. The company were not licensees. The pole was not placed by an agent of the defendants. The plaintiff's right of action, if any, is barred by reason of the action not having been brought within three months. On the question of nonfeasance and misfeasance, I refer to *McClelland* v. *Manchester Corporation*, [1912] 1 K.B. 118.

Shaw, in reply.

Falconbridge, C.J.

July 11, 1912. FALCONBRIDGE, C.J.:—I agree with the learned Judge that the only possible liability would be under sec. 606, arising from failure to repair. And this is non-feasance, and not misfeasance; and the plaintiff's right of action is barred by lapse of time.

Appeal dismissed; with costs if exacted.

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HOWSE v. TOWNSHIP OF SOUTHWOLD.

Britton, J.

BRITTON, J.:—The liability of the township, if any, arose by reason of the highway being in a dangerous condition—a condition created by the erection of the telephone pole. The township did not place the pole there—but the members of the council knew it was there. Even if express notice or knowledge could not be established, the pole was there for so long a time that notice and knowledge would be implied. That liability is for nonrepair—not a liability for the act itself of placing the pole on the highway. The liability being for nonfeasance, the limitation of three months as the time within which an action must be brought bars any recovery by the plaintiff. For these reasons and for reasons given by the learned Judge from whose decision this appeal is taken, the appeal must be dismissed, and with costs if demanded.

RIDDELL, J.

RIDDELL, J.:—I would dismiss the appeal with costs, on the short ground that the case stated does not contain any allegation of an act or omission of the defendants which resulted in or allowed the erection of the offending pole.

It will be seen that there is no permission to erect any pole on the highway—all that may be meant may be permission to string the wires across the highway, out of all danger.

If there is any fact which has not been brought to the attention of the Court, that is no fault of ours: we have no right to go beyond the case as stated.

Appeal dismissed.

Re GWYNNE.

ONT.

H. C. J. 1912

June 15.

Ontario High Court, Middleton, J. June 15, 1912.

1. TAXES (§ V C—196)—SUCCESSION DUTY—PROPERTY DEVISED TO A CHARITY—CHARITABLE PURPOSE TO BE CARRIED OUT IN ONTARIO—SUCCESSION DUTY ACT—9 EDW. VII. (ONT.) CH. 12, SEC. 6, SUB-SEC. 2.

Under sub-sec. 2 of sec. 6 of the Ontario Succession Duty Act, 9 Edw. VII. ch. 12, providing that no duty shall be leviable on property devised or bequeathed for religious, charitable or educational purposes to be carried out in Ontario or by a corporation or a person resident in Ontario, it is essential in order that a legacy to a corporation organized in England may be free from any duty that the charitable purpose of the legacy should be carried out in Ontario and it is not sufficient for this purpose that the money might without breach of trust be expended within Ontario.

2. TAXES (§ V A—181)—SUCCESSION DUTY—INHERITANCE TAX—9 EDW. VII. (ONT.) CH. 12.

The succession duty imposed upon all property in Ontario devolving upon death by the Ontario Succession Duty Act, 9 Edw. VII. ch. 12, is the only inheritance tax in Ontario.

3. TAXES (§ V C—190)—SUCCESSION DUTY—WHAT LEGACY IS TAXABLE—RESIDUARY ESTATE.

A succession duty established by the Ontario Succession Duty Act, 9 Edw. VII. ch. 12, is a tax which is to be borne by the legatee unless the will contains some provision casting the burden upon the residuary estate.

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H. C. J.

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RE GWYNNE.

4. TAXES (§ V B—186)—EXONERATION OF LEGACY FROM PAYMENT OF SUCCESSION DUTY—"FREE FROM LEGACY DUTY"—LIABILITY OF RESIDUARY ESTATE.

A legacy is exonerated from the payment of the succession duty established by the Ontario Succession Duty Act, 9 Edw. VII. ch. 12, when it is expressly declared by the will to be "free of legacy duty" and the payment of the duty required falls upon the residuary estate.

Statement

APPLICATION by the executors of the late Eliza Anne Gwynne for the determination of certain questions arising under her will.

D. T. Symons, K.C., for the executors.

T. P. Galt, K.C., for the British Union for the Abolition of Vivisection.

J. R. Cartwright, K.C., for the Treasurer of Ontario.

C. A. Moss, for the residuary legatee and certain specific legatees.

Middleton, J.

MIDDLETON, J.:—By the will in question the testatrix bequeathed "unto the Society called the British Union for the Abolition of Vivisection the sum of $75,000 free of legacy duty."

The British Union for the Abolition of Vivisection is an English organisation, having for its object "by means of active and systematic propaganda throughout the United Kingdom to secure the abolition of vivisection" and "to influence in favour of the object of the Union, candidates at elections, Parliamentary or municipal, and for county or parish councils, and to assist, if advisable, in the financial support of a direct Parliamentary representative."

This society is a charity, in the technical sense in which that term is used at law: *Re Foveaux, Cross* v. *London Anti-Vivisection Society*, [1895] 2 Ch. 501.

The first question is, whether the legacy is liable to succession duty. The statute 9 Edw. VII. ch. 12, sec. 6, sub-sec. 2, provides that "no duty shall be leviable on property devised or bequeathed for religious, charitable, or educational purposes, to be carried out in Ontario or by a corporation or person resident in Ontario."

In order that the legacy to this British corporation should be free from duty, it is essential that the charitable purpose should be one "to be carried out in Ontario;" that is, one which must, according to the terms of the devise, be carried out in Ontario; and it is not sufficient that the money might without breach of trust be expended within Ontario.

The reason for this exception is easily found when the history of the statute is borne in mind. By the preamble to the original Act, it is recited that "the Province expends very large

sums annually for asylums for the insane and idiots and institutions for the blind and for deaf mutes, and towards the support of hospitals and other charities, and it is expedient to provide a fund for defraying part of this expenditure by a succession duty." It is, therefore, quite logical that funds themselves bequeathed for the purpose of charities within the Province should be exempt from this form of taxation.

The expression "to be carried out in Ontario" is very similar to the expression found in Con. Rule 162, permitting service of process out of Ontario, where the action is on a contract "which is to be performed in Ontario." This Rule has invariably been treated as applicable only where the contract expressly requires performance within Ontario.

The second question arises upon the expression used by the testatrix by which this legacy is to be "free of *legacy* duty." Does this shift the incidence of the duty from the legatee to the residuary estate?

It is argued that "legacy duty" is not equivalent to "succession duty;" and it is pointed out in support of this contention that in another clause of the will the testatrix has used the expression "succession duty." This clause reads: "By reason of my estate being liable to pay succession duty to the Province, I do not in this my will remember other charities."

There is in England a definite meaning attached to the expression "legacy duty;" but in Ontario there is only the one inheritance tax. The statute calls this "succession duty." It is a duty imposed upon all property devolving upon death; and it is a tax which has to be borne by the legatee unless the will contains some provision casting the burden upon the residuary estate.

When the testatrix, domiciled in Ontario and speaking with reference to a bequest of property within Ontario, directs that it shall be free from legacy duty, I think I must hold that the intention was to exonerate this property from all duty payable upon the legacy. In other words, the succession duty is the only legacy duty known to Ontario law.

For these reasons, I answer the questions submitted by finding that the legacy is subject to the payment of succession duty, and that the executors are not entitled to deduct the duty from the legacy.

The costs of all parties may be paid out of the estate; those of the executors as between solicitor and client.

Order accordingly.

MAN.

K. B.
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Aug. 22.

ROBINSON v. CANADIAN NORTHERN R. CO.

Manitoba King's Bench, Macdonald, J. August 22, 1912.

1. DAMAGES (§ III L 2—244)—MEASURE OF COMPENSATION—REMOVAL OF SPUR TRACK BY RAILWAY.

The measure of damages for the wrongful removal by a railway company of a spur track adjacent to a coal and lumber yard, from which track, at small expense, coal and lumber could be unloaded from cars directly into such yard, is the additional cost of handling and hauling of such commodities from the freight yards of the company to the coal and lumber yard.

2. EVIDENCE (§ XII B—929)—SUFFICIENCY OF PROOF AS TO DAMAGES—REMOVAL OF RAILWAY SPUR—DISCREPANCY IN EVIDENCE AS TO COST OF HAULING COAL AND LUMBER.

The award of damages for the wrongful removal by a railway company of a spur track adjoining a coal and lumber yard from which coal and lumber could be unloaded from cars into the yard with little labour, based upon the owner's evidence of the additional cost of hauling coal and lumber from the company's freight yards, is not erroneous, though evidence that a transfer company would handle such commodities at a less sum per day for each team, if it appeared that the coal and lumber owners' teams were better than those of the transfer company and would do more work per day.

3. CARRIERS (§ III I—476)—DEMURRAGE—WRONGFUL REMOVAL OF SPUR BY RAILWAY—LONGER HAUL—ELEMENT IN FIXING DAMAGES.

Demurrage charges upon cars, due to slowness in unloading them by reason of a longer haul, may be considered as an element of damages for the wrongful removal by a railway company of a spur track adjacent to a coal and lumber yard, from which tracks cars of coal and lumber could be quickly and cheaply unloaded directly into such yard, where, by reason of such removal, such commodities had to be hauled by the owner of such yard from a greater distance in a slower manner.

Statement

APPEAL from the Master's report in the assessment and awarding of damages to the plaintiff.

The appeal was dismissed.

A. B. Hudson, for plaintiff.
O. H. Clark, K.C., for the defendants.

Macdonald, J.

MACDONALD, J.:—The facts are fully recited in the judgment of Mr. Justice Metcalfe, *Robinson* v. *Canadian Northern R. Co.*, 11 W.L.R. 578 (in appeal, 13 W.L.R. 8, 19 Man. L.R. 300, *Canadian Northern R. Co.* v. *Robinson*, 11 Can. Ry. Cas. 304, 43 Can. S.C.R. 387, and *Canadian Northern R. Co.* v. *Robinson*, [1911] A.C. 739, 13 Can. Ry. Cas. 412), and it is only necessary for me to review the findings of the Master on the various items on which he awarded the plaintiff damages.

There cannot be any doubt that the discontinuance by the defendant company of the spur track facilities for unloading and loading their material greatly increased the cost of the conduct of their business. With the use of this spur track the carloads were unloaded immediately opposite the shed and yards of the plaintiff. A carload of coal could be unloaded into

the shed by one man in a day and a carload of lumber could be unloaded by a team and a man in one day or by two men with push carts in a day.

After the removal of the spur track the plaintiffs were obliged to take delivery of their goods on what the defendants called their team tracks, being public delivery sidings, and cars consigned over the Canadian Pacific Railway they had to unload from that company's team tracks, no transfer being made as was the case prior to the removal of the spur tracks. In this manner extra time was consumed in having to bring the goods from the car to the yard, something over a mile.

The first item settled by the Master and to which the defendants take exception is the allowance for the increased cost of handling coal.

There were 190 cars delivered to and unloaded by the plaintiffs to their sheds, 30 of which were placed on what is known as stub tracks, and the additional cost of unloading from these tracks the Master finds to be $5.00 per car, and one hundred and sixty cars were unloaded from wherever they could be found in the public delivery sidings, and the additional cost of taking delivery of these carloads the Master finds to be ten dollars per car.

The evidence shews that prior to the removal of the spur track facilities one man could unload a car of coal in a day and that after the removal of such facilities it necessitated the use of horses and teamsters to do the work of this one man; taking two teams and teamsters one day to unload a car, and the cost is placed at $5.50 for a team and teamster, and there is a further charge of one dollar per car for degradation caused by extra handling, thus making twelve dollars per car, for which the Master has allowed ten dollars, deducting the two dollars per car which would be the expense of a man unloading prior to the removal of the spur track.

The defendants object that this estimate of the extra cost is guess work and not based on any fact, and that in any event, the allowance according to the evidence of Mr. T. D. Robinson is one dollar per car in excess of what it should be. At page 95 of this evidence he says the wages were $5.50 per day for a team and a man, but at page 110 he says that the charge of the Canadian Northern Transfer Co. was five dollars per day or fifty cents per hour. He claims, however, that his teams were worth more as they could get better work out of them, and Mr. Harstone's evidence tends to corroborate this, and the Master having so found, I do not feel disposed to interfere with his finding.

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The method of estimating the extra cost suggested and urged by the defendants I cannot adopt. Were there no evidence other than by shewing the actual number of miles travelled back and forth from the yard to the cars, that method might have to be resorted to, and in such a case a liberal allowance would have to be made for the many turns and delays incident to such a method; but, to my mind, there is evidence sufficient to justify the finding of the Master.

For the extra cost of handling of wood, the Master allows the sum of two thousand four hundred dollars, being six dollars a car for four hundred cars. Plaintiffs claimed 415 cars. 400 is allowed. It is claimed that 27 cars were unloaded from stubs 1 and 2, and as these stubs were opposite the plaintiff's yard no allowance should be made. There is no evidence, however, that they were opposite, and in reducing the number of the cars the Master has made provision for the possibility of an over-allowance in this item. It is evident from a glance at the plan Ex. 3 (printed case) that teams would be required to unload these cars from stubs 1 and 2 and the reduction by the Master in the number of the cars would even up the overcharge.

There is also evidence by which the Master based his computation as to damages on extra handling of lumber, the maintenance of Wall street yard and the allowance for demurrage, and from the most careful analysis of the evidence and reading of the exhibits, I have come to the conclusion that the Master's findings should not be disturbed, and I dismiss the appeal with costs.

I also dismiss the counter-appeal with costs.

Appeal dismissed.

STRANO v. MUTUAL LIFE ASSURANCE CO.

ONT.

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Ontario High Court. Trial before Mulock, C.J.Ex.D. June 13, 1912.

1. INSURANCE (§ III E 2—117)—REPRESENTATIONS BY INSURED AS TO STATE OF HEALTH — SUPPRESSION OF MATERIAL FACTS — AVOIDANCE OF POLICY.

Answers by an applicant for insurance, to questions on her medical examination, which the application declared to form the basis of the contract, so that any untruth or suppression of material facts therein would avoid the policy, in which answers the applicant stated that she had had pneumonia about year before; that she had fully recovered therefrom, that she had had occasional mild attacks of bronchitis, and that she had recently consulted a physician because of a cold, when in fact she was aware that she was then suffering from tuberculosis, and had been informed by such physician that she could live but a short time, were sufficient misrepresentations and suppressions of material facts of which the company should have been informed, to avoid the policy.

[*Jordan* v. *Provincial Provident Institution*, 28 Can. S.C.R. 554, and *Von Lindenau* v. *Desborough*, 3 Man. & Ry. 45, referred to.]

2. INSURANCE (§ III E 2—111)—FRAUD AND DECEIT—INSURANCE ON WIFE —HUSBAND BENEFICIARY—FALSE ANSWERS AND CONCEALMENT.

A husband, beneficiary in a policy of insurance upon the life of his wife, is a party to and affected by her misrepresentation and concealment of the fact where he knew that at the time she made application for such insurance she was suffering from consumption, and had been informed by a physician that she could live but a short time, and in spite of such knowledge that she was so affected, he took her to the agent of the insurance company and himself paid the premium for the insurance which he knew was being made for his benefit and omitted to disclose those facts to the company.

Statement

ACTION by Domenico Strano to recover $5,000 under a policy of insurance on the life of his deceased wife, Margaret D. Strano, made for his benefit.

The action was dismissed.

W. A. Henderson, for the plaintiff.
G. H. Watson, K.C., and *A. Millar*, K.C., for the defendants.

Mulock, C.J.

MULOCK, C.J.:—The application for the insurance was made by Mrs. Strano on the 29th August, 1910, and on the same day she underwent a medical examination and answered the questions upon which the examiner made his report to the defendants.

The policy was issued on the 30th September, 1910. On the 3rd February, 1911, Mrs. Strano died of tuberculosis.

The application for the policy contains the following declaration by the deceased: "I, the applicant for the above assurance, hereby declare that, to the best of my knowledge, information, and belief, my health is good, my mind is sound, and my habits temperate; that I usually enjoy good health, and do not practise any habit or habits that tend to impair my health or shorten my life; that the statements made above are respectively full, complete, and true; and I agree that such statements, with this declaration and any statements made or to be made

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to the company's examining physician, shall form the basis for the contract for such assurance; and, if there be therein any untruth or suppression of facts material to the contract, the policy shall be void and any premiums paid thereon forfeited."

The defence is, that, at the time of the application, the applicant's health, to her knowledge, was not good, nor did she usually enjoy good health, in that, at the time and for some time previously thereto, she had been suffering from and was affected by tuberculosis, from which she afterwards died; that the statement that she usually enjoyed good health was untrue, in that she was subject to and had, at different times, pneumonia, pleurisy; and that, in June, 1910, she had an attack of pneumonia which affected her lungs and resulted in consumption, from which she died.

In the examination of the deceased by the defendants' medical examiner, in connection with the application, the following questions were asked and answers given: Q. "Have you now or have you ever had any disease or disorder of the throat or lungs?" A. "Pneumonia one year ago; laid up ten days; fully recovered; no cough following; has also had occasional attacks of bronchitis (mild)."

The defendants said that this answer was untrue, in that she had not fully recovered, and did not disclose the fact that she had had a serious attack of pneumonia in June, 1910.

The deceased was also asked: "When were you last attended by a physician or when did you consult one and for what disease?" She answered: "Cold; four weeks; cleared up in three or four days; attended by Dr. Soday." She was further asked: "Are you now in perfect health?" To which she answered, "Yes."

The defendants said that these answers were untrue, in that, at the time of such examination, she was not in perfect health, and that the disease for which she was being attended by Dr. Soday was tuberculosis, from which she never recovered.

The defendants said that such misstatements and suppression of facts were material to the risk, and should have been made known to the defendants upon the negotiation for the policy; and that, by reason of such misstatements and suppression of facts, the policy is void.

The defendants further said that they were induced to make the policy by the fraud of the plaintiff; that, at the time of the application, he well knew the state of his wife's health, and that she was affected at the time with tuberculosis; and that he procured her to make the application for his benefit; and, for such purpose and in order to secure the issue of the policy, to misrepresent the actual state of her health; and to represent falsely that she was in perfect health, with intent to defraud the defendants of the insurance moneys.

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Meredith, C.J.

In my opinion, the evidence shews beyond reasonable doubt that the deceased was suffering from tuberculosis when Dr. Soday was called in, in June, 1910, and when, on the 29th August, 1910, she signed the application and gave the answers to the company's examiner. According to her statement to Mr. McIntyre on the 5th November, 1910, she had been unhealthy from childhood up. She was afflicted with a cough during Miss McIntyre's three weeks' visit in June, 1910; and it shewed no improvement when Miss McIntyre left. Mrs. Strano's state of health caused her to pass much of her time in bed. Her language and demeanour to Dr. Soday convinced him that she fully realised the nature of her disease; and it was impossible for her, when signing the application and making the answers, to have believed that she was then enjoying good health . . . . To her own knowledge, she did not usually enjoy good health; and at the time of the application it was not good. Her statement that she was then in perfect health—meaning thereby in reasonably good health—was in fact untrue.

Thus she made material misrepresentations and concealed material facts from the company as to the true condition of her health. It was material that the company should have known the facts; and the misrepresentation and suppression of facts thus found render the policy void: *Jordan* v. *Provincial Provident Institution*, 28 Can. S.C.R. 554; *Von Lindenau* v. *Desborough*, 3 Man. & Ry. 45.

I further find that the plaintiff, the beneficiary under the policy, was a party to the misrepresentations and concealments on the part of the deceased. In June, 1910, he was given to understand by Dr. Soday that his wife was then suffering from consumption, and was in such an advanced state that she would not live longer than nine months. He knew this when he took her to the insurance agent to effect the policy of insurance in question, and he paid the premium for that policy with his own funds, knowing that it was being effected for his benefit. . . .

In the witness-box he pretended that the idea of effecting insurance on the wife's life originated with her, and was carried out at her instance. I am unable to accept his testimony on the point. Whether or not the moral guilt attaches to both of them in equal degree is immaterial. The husband is here claiming the benefit of the policy, and is affected by his own conduct as well as hers. He knew, when the policy was effected, that his wife was dying of consumption, and he must have been aware that, if that fact were known by the company, the policy would not have been issued. He allowed them to remain in ignorance of the facts, and paid the premium, there-

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by identifying himself with the transaction. His own conduct is, I consider, sufficient to void the policy. He was a party to the fraud which procured its being issued, and cannot be allowed to profit by his own wrong.

I, therefore, think this action should be dismissed with costs.

Action dismissed.

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June 28.

Re VANCOUVER, VICTORIA & EASTERN R. CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin and Galliher, JJ.A. June 28, 1912.

1. ARBITRATION (§ III—17)—AWARD—CONCLUSIVENESS—SETTING ASIDE FOR FAILURE TO CARRY OUT UNDERTAKING—R.S.C. 1906, CH. 37, SEC. 198.

An award made by arbitrators appointed under sec. 196 of the Railway Act, R.S.C. 1906, ch. 37, to ascertain the compensation that should be paid for injuries to land not actually taken or used by the railway, the owners claiming that the land was injuriously affected because the railway was built between the land and the sea, thereby cutting off their rights of access to the sea, will be set aside because of the failure of the arbitrators to keep a promise made by them to the owners of the land when the suggestion was offered on the arbitration proceedings that the question of the applicability of sec. 198 of the Railway Act, R.S.C. 1906, ch. 37, to such a case should be referred to the court, which promise was that they, the arbitrators, should have it appear on the face of the award whether or not such section applied.

[Judgment rendered at the trial affirmed by divided court.]

Statement

THIS is an appeal from an order of Gregory, J., setting aside an award under the Railway Act.

The appeal was dismissed, the Court being equally divided.

A. H. MacNeill, K.C., for appellant.

Messrs. *D. Armour, J. R. Grant* and *A. W. V. Innes*, for respondents.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—During the course of the proceedings before the arbitrators a question was raised as to whether or not sec. 198 of the Railway Act could be applied to the facts of this case. No land had been taken from the owners claiming compensation. The railway did not touch their land, but they claimed that their lands were injuriously affected because of the construction of the railway between these lands and the sea. During such discussion it was suggested that the question of the applicability of said section be referred to the Court. This suggestion was not acted upon because the arbitrators promised the land owners that they would make it appear on the face of the award whether or not they had applied the section. This promise was not kept. There is no suggestion of bad faith on the part of the arbitrators, but the result was

that the land owners refrained from taking advantage of their right, and relied upon an equivalent, namely, to move if necessary after the award was made, which they could do if it appeared on the face of the award that the arbitrators had applied the section. Evidence was offered to shew that the arbitrators did apply the section. It was objected to on the ground that arbitrators are not permitted to give evidence as to what took place amongst themselves. In my view of the case it is not necessary to decide this question. The evidence shewing the promise is that of one of the solicitors in the proceedings before the arbitrators, and the award itself shews that that promise was not carried out. It does not, therefore, seem to me essential to shew either that the arbitrators did or did not apply the said section. They may have done so, and that, in my opinion, is sufficient to invalidate the award, if, in fact, the section is inapplicable.

In terms the section deals only with "lands through or over which the railway will pass." The increased value is that created "by reason of the passage of the railway through or over the same, or by reason of the construction of the railway." These two disjunctive clauses refer to lands through or over which the railway will pass. Farther along in the section reference is again made to the lands with which the section deals. The arbitrators are to set off the increased value against the loss or damage that may be suffered or sustained by reason of the company "taking possession of or using said lands."

To arrive, therefore, at the conclusion that sec. 198 applies, it is necessary to delete from the section the words "through or over which the railway will pass," and to disregard the plain and ordinary meaning of the words "taking possession of or using the said lands."

As against what I conceive to be the plain and grammatical construction and meaning of the clause, it is urged that the word "such" in the phrase "such value or compensation" at the beginning of the section, refers to the antecedent sections relating to arbitration, and properly includes both classes of claims, namely, those where land is taken and those where land is not taken or entered upon. This contention is correct, but I think the word "such" must be confined in its meaning by the rest of the section. It was also contended that it is not reasonable to suppose that Parliament intended to make one rule for one class of claims and another for another class when there is no apparent reason for doing so. While that is a circumstance not to be overlooked, it does not appear to me to outweigh the obstacles in the way of the construction which the appellants contend for.

It was also strongly pressed upon us in argument that the railway actually entered upon and took possession of "land"

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of the respondents within the definition of land in the interpretation clause of the Act; that the respondents' rights to access to the sea are hereditaments within the meaning of that definition, and that when the appellants built their line along the foreshore in front of respondents' property they in effect took an interest in land by destroying that which was an incident to the enjoyment of the land. The respondents' right to access to the sea may be an hereditament; if so, it is an incorporeal one. The railway company is given by the Act the right to enter in and upon the lands of other persons, and looking at the whole purpose and context of the Act, I am of opinion that assuming the right in question to be an hereditament, the definition of land above referred to must be confined to corporeal hereditaments. I think the language of Lord Watson in *Great Western Railway Co.* v. *Swindon & Cheltenham Railway Co.* (1884), 9 A.C. 787, at p. 800, is applicable to this case. He says, speaking of the English Lands Clauses Act, which contains a definition of land practically identical with that in the Railway Act:—

> Now, it is perfectly true that the word "lands" as it occurs in many of the leading clauses of the Act of 1845, is, by reason of the context, limited to corporeal hereditaments. Taking that Act *per se*, and irrespective of the terms of any other statute, these clauses do not appear to be applicable to the compulsory taking of an easement, at least in the sense in which the respondents are by their Act empowered to purchase and take such a right. The only easements which these provisions, read by themselves, seem to contemplate, are servitude rights burdening the corporeal lands taken by the company, which are destroyed or impaired by the construction of the railway. The company are not dealt with as being either entitled or bound to purchase and take such easements, but as liable to make compensation in respect of their having by the construction of their authorized works injuriously affected the dominant land to which the easements are attached.

The appeal should be dismissed.

Irving, J.A.

IRVING, J.A.:—Gregory, J., set aside the award on the application of the owners.

Sec. 198 requires the arbitrators to ascertain what amount should be allowed to the owner for inconvenience, loss or damage suffered or sustained by reason of the railway company taking possession of or using his land.

Although I am of opinion that sec. 198 does not apply to this case, yet I do not see why the arbitrators should not in ascertaining the compensation payable to the landowner in respect of the incorporeal hereditament adopt for their guidance the principles indicated by sec. 198. Incorporeal hereditaments are deemed to be in the possession of him who is entitled to them.

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In this case the railway do not take possession or use any of the land the property of the respondents. How then can anything be set off against something which cannot be ascertained? Sec. 198, therefore, in my opinion, cannot apply to this case.

That being so, can this award be set aside? Mr. Gordon contended that as the arbitrators had taken sec. 198 into consideration, they were guilty of that technical misconduct which is included in sec. 11 of the Arbitration Act—misconduct only in the sense that they made a mistake as to the scope of the authority conferred on them. There is no doubt that an award will be set aside if an arbitrator has gone wrong in point of law, and the error in law appears upon the face of the award. This was decided many years ago: *Hodgkinson* v. *Fernie* (1857), 3 C.B.N.S. 189, and was acted upon by this Court in *Humphreys* v. *Victoria*, 5 D.L.R. 294, 21 W.L.R. 555.

The principle is this: Courts are unwilling to interfere with the decision of those whom the parties have selected to be the judge of the law and the fact; so, for a mistake in law, the award will not be ground for setting it aside, unless it appear on the face of the award: see cases collected in Redman on Awards, 1903 ed., p. 276.

As pointed out by Parke, B., in *Phillips* v. *Evans*, 12 M. & W. 309:—

> Although we may possibly do some injustice in particular cases, I think it is better to adhere to the principle of not allowing awards to be set aside for mistakes, and not to open a door to inquire into the merits, or we shall have to do so in almost every case.

It has always been the inclination of the Courts to uphold rather than set aside awards: *Re Templeman*, 9 Dowl. 962; *Cock* v. *Gent*, 13 M. & W. 364; 15 L.J. Ex. 33; *Re Falkingham*, [1900] A.C. 452; *Adams* v. *Great Northern*, [1891] A.C. 39; *Howenzollern*, 54 L.T. 596. *Hodgkinson* v. *Fernie*, 3 C.B.N.S. 189, is instructive on other points raised in this case. It lays down the rule that there is no difference whether the award is by a professional man or a layman, and it also deals with the question as to an award being sent back for a mistake in law not apparent on the face of the award, but disclosed in a separate writing; and the case of *Jones* v. *Corry*, 5 Bing. N.C. 187, was mentioned as an authority to send the case back on the strength of a letter written by the arbitrator after the award had been made. In 1861, *Holgate* v. *Killick*, 31 L.J. Ex. 7, 7 H. & N. 417, the Court refused to look at a letter written by a Master to whom the case had been referred.

In 1875 *Dinn* v. *Blake* was decided, L.R. 10 C.P. 388; the application to remit was based upon a verbal statement made by the arbitrator as to the grounds on which he had decided. The application was refused because it was not shewn that the arbitrator had admitted that he had decided erroneously, fol-

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lowing *Lockwood* v. *Smith*, 10 W.R. 628. There was nothing to indicate to the Court that the selected tribunal was desirous of the assistance of the Court: *per* Archibald, J., at 391, and willing to review his decision on the point on which he believed himself to have gone wrong: *per* Brett, J., at 390; Denman, J., expressed the same opinion. In the interval the opinion had been given by Mr. Baron Cleasby in advising the House of Lords in *Duke of Buccleugh* v. *Metropolitan Board of Works*, that in an application to set aside an award on the ground of mistake or misconception of the arbitrator, the Court would probably reject no means of informing itself whether the arbitrator had proceeded upon such a mistake or misconception: L.R. 5 H.L. (1872), at 436.

The rule is summed up by Strong, J., in *McRae* v. *Lemay*, 18 Can. S.C.R. 280, that to interfere on the ground of mistake in law (1) the mistake must appear on the face of the award, or in some paper which forms part of the award, and is by reference incorporated with it; (2) where the arbitrator has himself shewn that he is not satisfied with the award and is desirous of the assistance of the Court on the point on which he believes he has gone wrong.

Having reached this conclusion, we may now read what the arbitrators have said or written.

The letters written by His Honour Judge Lampman cannot be regarded as an official act: see sec. 197 (2) so as to amount to an expression of opinion by, or a request on behalf of the majority that the Court should lend its assistance and advice to the Board. The landowners therefore have not satisfied the onus which is cast on them, that there should be an expression from a majority of the Board of a willingness to reconsider the matter. Judge Lampman's letter amounts to nothing more than this: "We may have been wrong, and therefore you are in a position to carry it further"; but it is to be noted that although requested, in terms, to do so, he does not request nor consent to the application being made.

Then there remains the point put before us by Mr. Armour, that the counsel for the landowners were misled by a remark made at the hearing by the presiding member of the Board, and that as a consequence the landowners have been deprived of their right of appeal. It has been truly said that the surest way to have a misunderstanding is to have an understanding. The usual and proper way to take the opinion of the Court as to scope of a submission to arbitration when you are dissatisfied with the course being taken at the hearing, is to apply to revoke the submission or to ask for a special case: *Hart* v. *Dyke*, 32 L.J.Q.B. 55. In this case no request was made to the Board for a stated case, nor was there any application to revoke.

It is true that certain evidence was objected to (p. 60), but the record does not shew that the objection was pressed or that any agreement was made between counsel, or between the Board and counsel. In fact, as already mentioned, there was no request for, and therefore no refusal of, a stated case. The counsel for the landowners chose to rely on what the presiding member said was his intention, but it seems the presiding member was not able to carry out this intention.

I do not see that the other members of the Board were bound by the presiding member's declaration of intention, as the submission was to two. The promise of the presiding member, if promise is the proper word, must be understood as being subject to the speaker's ability to get another to agree with him. I do not think either of the other two members of the Board was called upon to express approval or dissent from the proposed course, nor was counsel or the railway bound to object. An obligation to speak by no means arises from a mere challenge.

I would allow the appeal.

Martin, J.A.

MARTIN, J.A.:—While I have reached the same conclusion as the learned Chief Justice, I am far from being free from doubt about the true construction of this difficult section, 198, and think it desirable to add that in my opinion the definition of "lands" is sufficient to cover the right of access in question, which is a "natural right" and a species of easement: Goddard on Easement, 3; 11 Hals. 238; and clearly an incorporeal hereditament according to the authorities: *e.g.*, *Great Western R. Co.* v. *Swindon R. Co.* (1882-3), 52 L.J. Ch. 306, 53 L.J. Ch. 1075; *The Queen* v. *Cambrian R. Co.* (1871), L.R. 6 Q.B. 422, 9 A.C. 787; *Lyon* v. *Fishmongers Co.*, 1 A.C. 662; *North Shore R. Co.* v. *Pion* (1889), 14 A.C. 612, which also shew that there is no difference in principle between the rights of access of riparian owners on tidal waters or navigable and non-navigable streams. But it would appear from the judgment of Lord Watson, in the *Great Western* v. *Swindon* case, 52 L.J.Ch. 306, 53 L.J.Ch. 1075, that unless the corresponding English Land Clauses Act

> is incorporated with enactments which expressly confer upon the promoters power to purchase and take incorporeal hereditaments by compulsion,

it does not apply to hereditaments of that nature, and in view of the fact that this opinion of Lord Watson has been applied by the Court of Appeal in *Re The City and South London R. and the United Parishes of St. Mary, etc.*, [1903] A.C. 728, I think it is a safe guide to follow in this case in construing the effect that is to be given to the crucial words in sec. 198, viz: "any lands of the opposite party through or over which the railway will pass." Though the expression in our interpreta-

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tion, sub-sec. 15 of sec. 2, is at first blush somewhat broader than the corresponding interpretation of "lands" in sec. 2 of the English Land Clauses of 1845 (8 and 9 Vict. ch. 18) because it says that land "includes real property messuages lands, tenements and hereditaments of any tenure," whereas the English Act omits "real property," yet that really does not carry the matter any further, because although in the broad conveyancing sense all property must be either real or personal, yet the decision of the Queen's Bench Division in *Laws* v. *Eltringham* (1881), 8 Q.B.D. 283, shews that, where the sense of the matter and the context require it, the wide term "any real or personal property whatsoever" will be applied to tangible property only, and not to incorporeal rights.

I therefore agree that the appeal should not be allowed.

Galliher, J.A.

GALLIHER, J.A.:—This is an appeal from the judgment of Gregory, J., setting aside an award dated December 9th, 1911, made by His Honour Peter S. Lampman, and Howard J. Duncan, two of the arbitrators appointed to act in an arbitration respecting above lots, between the Vancouver, Victoria and Eastern Railway and Navigation Company and J. J. Banfield and Evans B. Deane.

The award simply fixes the damage sustained at one dollar per lot, and is valid on its face.

The parties attacking the award contend that it was agreed between the arbitrators and all parties concerned during the arbitration proceedings, that the arbitrators should in their award set out the amount which they considered the lots in question were damaged by the construction of the railway, and also the amount to which they considered such lots were benefited.

Had this been done, the claimants would have been in a position to apply to the Court to set aside the award on the ground that the arbitrators proceeded upon a wrong principle provided sec. 198 did not apply, which was the claimants' contention.

There is nothing on the face of the award which shews whether or not the arbitrators dealt with sec. 198, but in correspondence which took place subsequent to the award being made between the chairman, Judge Lampman, and the solicitors for the claimants, it appears that the two arbitrators who made the award considered that sec. 198 did apply, and the only reason why they did not shew on the face of the award the amount of damages and the increased value, was because no two of them could agree as to the damage to any particular lot, but two of them did agree that the damage was fully compensated by the increase in value and awarded the nominal sum of one dollar in respect of each parcel.

Objection was taken that this correspondence is not admissible, and I agree that it is not admissible in so far as it may

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be sought to shew matters included in or excluded from the award by the arbitrators: *Duke of Buccleugh* v. *Metropolitan Board of Works* (1872), 5 E. & I., appeals at 436.

But we have in the arbitration proceedings the opinion expressed by the chairman, Judge Lampman, and Mr. Duncan, another of the arbitrators, that sec. 198 did apply, and evidence was taken of increased valuation subject to objection by the claimants. In looking at the award itself, and having in view the evidence, I think we must reasonably assume that in making their award the arbitrators did apply sec. 198.

It then becomes necessary to inquire as to whether the agreement as contended for was entered into, and if so, have the respondents been prejudiced in the non-fulfilment of same?

I think we must assume from all the evidence before us (and in this respect I consider the correspondence admissible) that the agreement was entered into, or the promise given, as it is styled.

When the question of the applicability of sec. 198 came up, the plain and proper course for the respondents to have taken was to have asked for a reference under the Arbitration Act, and is the one which I think counsel should have pursued, but on the other hand, had the arrangement been carried out as promised, they would have had their remedy as I have above pointed out.

We have then to consider whether the failure to carry out the arrangement amounted to legal misconduct, and if so, have the respondents been prejudiced?

Under the authorities, a request made to refer and a consent given but not acted upon by the arbitrators, and an award made without such reference, has been held to be legal misconduct and the award set aside.

I can see no distinction between such a case and the one under consideration, but as Courts of law should favour the upholding of awards unless some manifest injustice would be done, we should, I think, consider whether the respondents have been prejudiced by reason of the failure of the arbitrators to carry out their agreement.

Admittedly if sec. 198 applies they could not be prejudiced, as under the course the respondents chose to pursue, had the arbitrators carried out their promise, the only ground open would be that sec. 198 did not apply, and therefore the arbitrators had proceeded upon a wrong principle.

Section 198 is as follows:—

> The arbitrators or the sole arbitrator in deciding on such value or compensation shall take into consideration the increased value beyond the increased value common to all lands in the locality that will be given to any lands of the opposite party through or over which the railway will pass by reason of the passage of the railway through or

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over the same, or by reason of the construction of the railway, and shall set off such increased value that will attach to the said lands against the inconvenience, loss or damage that might be suffered or sustained by reason of the company taking possession of or using the said lands.

The short point in regard to this section is, does it apply where the company constructing the railway does not use or take possession of any of the lands of the applicants?

The respondents' contention is that because the company do not use or take possession of any of the lands of the applicants, no set-off under this section can be applied, although they may claim damages in respect of such lands for injurious affection by reason of the construction of the railway.

Under the section, the arbitrators having decided that by reason of the construction of the railway an increased value beyond that common to all lands in the locality has been given to the lands in question, shall take into consideration such increased value. "Shall take into consideration" clearly implies for some purpose, and the respondents say that purpose is qualified by the latter words of the section, "and shall set off such increased value," etc., to the end.

I think we should endeavour to get at what was the intention of Parliament in framing this section. The first part of the section directs that the arbitrators shall take into consideration, etc., not only increased value by reason of the passage of the railway through or over the lands, but by reason of the construction of the railway as well—this latter is wide enough to include lands not touched by the railway, and since the arbitrators are directed to consider increased value in respect of such, direction in this respect would be useless if it can only be applied to lands actually entered upon.

There are no words in the section directly forbidding such application, and it should not be presumed that Parliament legislates uselessly. It seems to me that Parliament could not have intended (that in a case where compensation for damage is sought in respect of lands not taken but injuriously affected by the construction of a railway), after directing that increased values to the lands by reason of such construction should be considered that such increased values could not be set off. If necessary I would read in at the end of the section the words "or by reason of the construction of the railway."

I think that sec. 198 is applicable, and if I am right the respondents are in no way injured by the failure of the arbitrators to carry out the agreement.

The judgment of Gregory, J., should be reversed, and the award restored.

Appeal dismissed by divided Court.

Re TURNER.

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Ontario High Court, Riddell, J., in Chambers. June 19, 1912.

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June 19.

1. EXECUTORS AND ADMINISTRATORS (§ III A—69)—APPLICATION OF EXECUTORS FOR ADVICE OF COURT—WHETHER PROPERTY BELONGS TO ESTATE—MANAGEMENT OR ADMINISTRATION OF THE PROPERTY—R.S.O. 1897, CH. 129, SEC. 39, SUB-SEC. 1.

It is not within the power of the Court to advise an executor under sub-sec. (1), sec. 39, ch. 129, R.S.O. 1897, as to whether property belongs to the estate he represents or to another person, since that is not a question pertaining to "the management or administration of the property" about which the Court may, under such sub-section advise the personal representative of a deceased person.

[*Re Rally* (1911), 25 O.L.R. 112, followed.]

2. WRIT AND PROCESS (§ II C—35)—LEAVE TO SERVE SUBSTITUTIONALLY—NOTICE OF MOTION FOR DIRECTION TO EXECUTORS—CON. RULES 1897 (ONT.) 938(*a*).

Under Consolidated Rule 938(*a*), Ont. C.R. 1897, giving an executor right to serve a notice for the determination without the administration of the estate of any question affecting the rights or interests of the persons claiming to be crediting devisee, legatee, next of kin or heir at law or *cestui que trust*, the Court will not grant leave to serve substitutionally one who has a claim upon certain land of the estate as the rule is not intended to enable a determination whether certain property belongs to an estate or not.

Statement

APPLICATION by the executors of Anne E. Turner for advice under R.S.O. 1897 ch. 129, sec. 39 (1).

E. R. Read, for the applicants.

Riddell, J.

RIDDELL, J.:—John Turner died in 1887, having devised lot 6 on the north side of Marlborough street, Brantford, subject to a mortgage in favour of a loan company, to his daughter; in 1889, the daughter married Horace Spence, and about a year later died in child-bed, intestate; her child died within a few months—whereby the husband became the owner of the lot. He verbally renounced, it is said, all claim to the lot, giving it up to Anne E. Turner, his mother-in-law, the widow of John Turner. She died in 1908, having been in receipt of the rent of the lot from the time of her grandchild's death in about 1891. In her will she left her real estate upon trust for sale, the proceeds to be in trust for her daughter Mrs. Chittenden for life, or, if she should survive her husband, absolutely; if she should predecease him, then her children were to have it in equal shares. It is said that these children are now of full age, and are the persons entitled to the estate. I assume, therefore, that Mrs. Chittenden died before her husband.

The assignees of the mortgagees under John E. Turner's mortgage has sold for $1,505. After paying the mortgage, there remained a balance of $679.09. This was claimed by the Brantford Trust Company Limited, as executors of Anne E. Turner, and paid to them under a bond of indemnity.

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It appears that Spence, shortly after the death of his child, went away sailing, and has led the life of a sailor ever since—about four times a year communicating with his father, the last time from the West Indies.

The executors of Anne E. Turner now apply for advice under R.S.O. 1897 ch. 129, sec. 39 (1), and base the practice on Con. Rule 938 (g). They ask advice as to what they are to do with this sum of $679.09.

A few months ago, I again pointed out that the statute does not authorise the determination of questions of this kind on an application for advice: *Re Rally* (1911), 25 O.L.R. 112. What is, of course, desired is to determine whether Spence or the estate of Mrs. Turner is entitled to this sum; and that is not "any question respecting the management or administration of the property."

The motion, then, is refused.

Then I am asked for leave to serve Spence substitutionally by delivering a notice under Con. Rule 938 (a). That is equally out of the question. The Con. Rule was not intended to enable a determination of whether certain property belongs to an estate or not.

When trust companies take over the administration of an estate, they have the same obligations as other executors or administrators—their whole function is not to make or lose money for their shareholders; and they must take all the obligations, as well as the emoluments, of private executors. If they have in their hands money which rightfully belongs to Spence, that is a matter for them to adjust—and there is no short-cut provided by the Legislature. It is said that Spence's father is likely to hear from him before long; if so, one would think a reasonable course for those depositees of the money would be to see what position Spence takes in reference to it—it may be that he will release all right to the money or convey all right he may have to the company or the grandchildren of Anne E. Turner, and so get rid of any difficulty; or it may be that he will insist upon being paid the sum himself or that it be paid to his father. Then it will be for the company to decide what to do. I am not giving this as any advice, but throw it out as a suggestion of what ordinary business methods and practice would indicate should be done.

As things are now, the application for substitutional service is also refused.

As there was no opposition, there will be no costs: but the applicants are not to be allowed to charge the costs of this application against the estate.

Order accordingly.

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Ontario Divisional Court, Falconbridge, C.J.K.B., Britton and Riddell, JJ. May 10, 1912.

1. EVIDENCE (§ II I—303)—PRESUMPTION IN FAVOUR OF JUDICIAL ACTS—COURT OFFICIAL—MATTERS OF ROUTINE.

Where there is any conflict or discrepancy as to the action of a judge or court officer in any matter of routine, the presumption that all was done rightly should prevail.

2. DISMISSAL AND DISCONTINUANCE (§ I—1)—RIGHT OF PARTY MOVING TO QUASH A CONVICTION TO DISCONTINUE HIS APPLICATION.

It should be only where there is absolutely no doubt, that a party litigant, invoking the aid of the court to get rid of a conviction, should, after going a certain length, and being likely to fail, be permitted to stop short and deny the right of the court to go further.

3. APPEAL (§ III F—98)—EXTENSION OF TIME—APPEAL FROM CONVICTION UNDER INSPECTION AND SALE ACT, R.S.C. 1906, CH. 85, SEC. 335—JUDICIAL DISCRETION.

Where, under section 335 of the Inspection and Sale Act, R.S.C. ch. 85, the court or judge hearing an appeal from a conviction under that Act has once extended the time for hearing and decision beyond the 30 days thereby limited, the time for such hearing and decision is then wholly at large and in the discretion of the court or judge.

4. PROHIBITION (§ V—32)—PROCEDURE—WHEN WRIT MAY ISSUE—APPLICABILITY WHERE JUDICIAL OFFICER EXERCISES JURISDICTION IN ILLEGAL AND IRREGULAR MANNER.

Prohibition is not *ex debito justitiæ;* it is an extreme measure, and is not granted in case of a mere illegality or irregularity not going to the jurisdiction, or where the judicial officer having jurisdiction exercises it in an irregular manner.

[See *In re Birch*, 15 C.B. 743; *Re Cummings and County of Carleton*, 25 O.R. 607, 26 O.R. 1; *Regina* v. *Mayor of London*, 69 L.T. R. 721; *Regina* v. *Justices of Kent*, 24 Q.B.D. 181.]

5. PROHIBITION (§ V—27)—DOUBT AS TO JURISDICTION OF INFERIOR COURT—JUDICIAL DISCRETION IN REFUSING PROHIBITION.

Where there is doubt in fact or law whether an inferior court is exceeding its jurisdiction, or is acting without jurisdiction, the superior court should exercise its discretion to refuse prohibition.

[*Worthington* v. *Jeffries*, L.R. 10 C.P. 379, referred to.]

6. PROHIBITION (§ V—32)—JURISDICTION OF INFERIOR COURT—INCORRECT ORDER—ENLARGEMENT OF MOTION TO ALLOW CORRECTION OF MISTAKE.

Upon a motion for prohibition, where, in a matter in which it has jurisdiction, an inferior court has made an order which is incorrect, but which it can easily set right, the proper course is not to grant prohibition, but to enlarge the motion so as to give the inferior court an opportunity to correct the mistake, and, if it be corrected, to dismiss the motion.

Statement

AN appeal by the defendant from the order of Sutherland, J., on an application by him for an order prohibiting the respondents from enforcing certain orders made by the Judge of the County Court of the County of Huron.

The appeal was dismissed.

The judgment appealed against is as follows:—

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November 3, 1910. SUTHERLAND, J.:—This is an application on behalf of one Derrick F. Hamlink, the appellant in three similar proceedings, "for an order that the respondents, The King, Merrit R. Baker, Bernard Lewis Doyle, Esquire, Judge of the County Court of the County of Huron, and Daniel McDonald, clerk of the said Court, be" in each case "prohibited from taking any further proceedings in the said actions, or upon three certain orders made therein, bearing date the 30th day of April, 1910, and intituled 'In the County Court of the County of Huron,' dismissing the appeals of the said Hamlink to the County Court from three convictions" made "on the 11th day of January, 1910, by John Butler, Police Magistrate for the Town of Goderich, under the Inspection and Sale Act, R.S.C. 1906, ch. 85, sec. 321, whereby the said Hamlink was found guilty" in each case "of a violation of said Act, and ordered to pay the sum of $10," in each case, by way of fine, and also in each case a specific sum for costs, "or upon a certificate of taxation given under each of said orders by the said clerk," and "to set aside the said orders and certificates and all proceedings that have been or may be taken under the same."

An information was laid in each case before the said Police Magistrate by Merrit R. Baker, a Dominion Fruit Inspector, on the 3rd day of December, 1909, and the charges were tried before the said Magistrate and convictions made in each case upon the 11th January, 1910.

An appeal to the County Court of the County of Huron was taken from the said convictions on the 17th day of January, 1910, pursuant to sec. 355 of the said Act, the sum of $250 being deposited by the appellant with the said Police Magistrate on lodging his appeal. The matters apparently first came before B. L. Doyle, Esquire, Senior Judge of the said County Court, on the appeals, on the 7th day of February, 1910, whereupon he endorsed and signed on each of the notices of appeal the following memorandum: "I hereby extend the time for hearing the appeal herein for ten days from this date. Dated 7th of February, 1910. B. L. Doyle, J. C. C. Huron."

On the 17th February, 1910, the matter apparently again came before him, and he endorsed a further extension of time to the 17th March, 1910, at one p.m.

Before such last-mentioned extension had expired, apparently, he, on the 10th day of March, 1910, made another extension to the 22nd March, and fixed that date at one p.m. for the hearing of the appeals.

The appeals were heard accordingly on the 22nd and 23rd days of March, 1910, and judgment reserved.

It is said on behalf of the applicant on this motion that at the conclusion of the hearing no further enlargement was made by the said Judge.

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The respondent, on the motion, filed an affidavit of his solicitor, in which it is stated that on the 23rd March the argument of the case was postponed until the 28th March and again postponed until the 29th March, when the appeals were argued and judgment reserved; and, in the same affidavit, what purports to be a copy of a memorandum taken from the book kept by the clerk of the said County Court, under date the 23rd March, 1910, reads as follows: "Trial concludes at 11.15 a.m.; argument postponed until the 28th March, 1910, at 11 a.m."

In each case a written judgment in the following terms was later handed out by the said Judge: "I affirm the conviction herein, and order that the sum thereby adjudged to be paid, together with the costs of the said conviction and the costs of this appeal, shall be paid out of the money deposited by the said appellant on lodging his appeal with the Police Magistrate for the Town of Goderich, and that the residue of the said deposit, if any, shall be paid to the said appellant. Dated at Goderich this 30th of April, 1910."

After the disposition of the appeals as aforesaid by the said Judge, the respondent filed and served copies of his bill of costs in each of the cases, and took out an appointment to tax the same before the clerk of the said County Court, and they were taxed on the 16th day of June, 1910, at $104.50, $29.95, and $27.45 respectively.

On the 9th day of June, 1910, formal orders dismissing the said appeals had been settled by the said Judge, in the presence of counsel for both parties; and the said orders, when issued, were dated the 30th day of April, 1910, and were filed in the office of the said clerk on the 16th June, 1910.

Each of the orders contains the following clauses:—

"(2) This Court doth order that the said appeal be and the same is hereby dismissed, and the said conviction affirmed, with costs to be paid by the appellant to the respondent; such costs to be taxed according to the scale of costs taxable in this Court, and such costs to be taxed by the clerk of this Court.

"(3) And this Court doth further order that such costs, when so taxed, be paid by the appellant to the clerk of this Court to be paid over by the said clerk to the respondent.

"(4) And this Court doth further order that such costs be paid by the appellant within one week of the day when the same are so taxed as aforesaid."

An affidavit of the solicitor for the appellant herein, sworn on the 20th day of June, 1910, is filed upon this motion, and says in part:—

"(6) The time for hearing the said appeals was enlarged by the Judge of the County Court from time to time until the trial, which took place on the 22nd and 23rd days of February, 1910. The learned trial Judge, on the completion of the trial, reserved

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his judgment. The said Court was not, however, adjourned: nothing was done in connection with said appeals by way of rendering a decision therein until the 30th day of April last, when the Judge of the County Court handed out a finding dismissing each of the appeals with costs."

"(7) The respondent Merritt R. Baker then caused a final order to be taken out, which order bears date the 30th day of April, 1910, but was not signed by the trial Judge until within the last few days.

"(8) Upon the settling of the said orders dismissing the three appeals, I took objection to the order, on the ground that the Judge should fix the amount of costs that should be paid by the appellant, if any.

"(9) The respondent, after the said order was issued, proceeded to make up his bills of costs in each of the three appeals, and had them taxed, as directed by the said orders, by the clerk of the County Court of the County of Huron, in accordance with the County Court tariff. I appeared on said taxation, and objected to the clerk of the County Court proceeding, and said objection was noted. The said bills were taxed in part and left in order that the respondent might apply to the trial Judge for fiats and counsel fees.

"(10) Notice of application for fiats was served, and I attended upon said application, and objected to the learned Judge fixing any counsel fee, as he would do in an ordinary County Court case, and took the objection that he had no jurisdiction, as he had already signed the order, and that in my opinion, even before he signed the order, he was *functus officio*. The learned Judge expressed himself as of the opinion that there was considerable force in my contention, but was of the opinion that he had jurisdiction to amend his order of the 30th of April, 1910, revise the taxation made by the clerk of the County Court, and adopt and embody it in his order dismissing the appeal. The counsel for the respondent appeared to agree with that contention, and, on the request of the Judge, handed over to him the several bills for the purpose of allowing him to revise same. The learned Judge then proceeded to revise said bills, and, on his announcing what he proposed to do with them, the counsel for the respondent stated that he had not come prepared to argue the question of the right of the appellant to object to said order or to the terms of it, and asked that the matter stand to permit of it being further argued before His Honour.

"(11) The counsel for the respondent, immediately on leaving the chambers of the trial Judge, took the bills to the clerk of the County Court, and insisted upon him closing the taxation and taxing such counsel fee as he could without fiat.

"(12) The Judge of the County Court, when the matter was first before him, and after he had given an expression of what

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he would do with the bills, was informed by counsel for the respondent that he had an order signed by the Judge, and that they did not purpose going before him again to further argue the matter or ask for any further directions with the costs, and the trial Judge then stated that it appeared to him that the counsel for the respondent had simply given him the bills to find out what his attitude would be, and, when he found that it was opposed to the contention of the respondent, that he had wished to withdraw it.

"(13) The clerk of the County Court, at the request of the respondent, as I am advised and believe, closed the taxation and issued his certificate; and I am of the opinion that, unless the respondent and the said County Court clerk be restrained by the order of this Court, execution will be issued out of the said Court and distress made of the goods of the appellant."

A further affidavit was filed by the respondent on these appeals, made by a solicitor who acted as agent for the respondent's solicitor on the taxation of the said bills, and which contains the following statement: "Said taxations were completed by the clerk of the said Court with the exception of fixing the counsel fees of the respondent's counsel at the trial of the appeals; and, in accordance with the practice of the Court, I served Mr. Blair (the appellant's solicitor) with a notice to attend before His Honour Judge Doyle for the purpose of getting fiats for such counsel fees, and upon the return of such notice Mr. Blair attended and objected to the Judge granting fiats, contending that the learned Judge should have fixed the costs in the orders which he made dismissing the appeals; and the learned Judge said that, if such was the case, he would amend the orders and fix the costs; but I contended that I was not there for that purpose, but only on the application for the fiats; and, as the orders stood until the appellant moved to set them aside or vary them, my instructions were to abide by them; and, when the learned Judge informed me that he would not fix a greater counsel fee than $10, I informed him that there was no necessity for obtaining his fiat, as the clerk of the County Court could tax a counsel fee of that amount himself; and I declined to have the learned Judge retax the bills unless the appellant should, in the first place, either move to set aside or amend the order already made; and I then immediately proceeded to the clerk's office, and, in the presence of Mr. Blair, closed the taxation of the costs and obtained a certificate from the clerk of the result of the taxation and served the same upon Mr. Blair."

Upon this application, I am asked to grant prohibition on several grounds. The informations were laid under the Act respecting the Inspection and Sale of Certain Staple Commodities, R.S.C. 1906, ch. 85, sec. 321, sub-secs. 2 and 3, for alleged violations in reference to the quality of the apples packed. Section 335 of said Act is as follows:—

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"No appeal shall lie from a conviction under this Part except to a Superior, County, Circuit or District Court, or the Court of the Sessions of the Peace, having jurisdiction where the conviction was had; and such appeal shall be brought, notice of appeal in writing given, recognizance entered into or deposit made, within ten days after the date of conviction.

"2. The trial on any such appeal shall be heard, had, adjudicated upon and decided, without the intervention of a jury, at such time and place as the Court or Judge hearing the trial appoints, and within thirty days from the date of conviction, unless the said Court or Judge extends the time for hearing and decision beyond such thirty days.

"3. In all respects not provided for in this Part, the procedure under Part XV. of the Criminal Code shall, so far as applicable, apply to all prosecutions brought under this Part."

There is an amendment to this Act in 1908, but it deals only with the question of penalties, and is not of importance in connection with these appeals.

The Criminal Code, R.S.C. 1906, ch. 146, Part XV., sec. 751, prescribes that "the Court to which such appeal is made shall thereupon hear and determine the matter of appeal and make such order therein, with or without costs to either party, including costs of the Court below, as seems meet to the Court, and, in case of the dismissal of an appeal by the defendant and the affirmance of the conviction or order, shall order and adjudge the appellant to be punished according to the conviction or to pay the amount adjudged by the order, and to pay such costs as are awarded, and shall, if necessary, issue process for enforcing the judgment of the Court.

"2. In any case where a deposit was made on appeal previously to the twentieth day of July in the year of our Lord one thousand nine hundred and five, if the conviction or order is affirmed, the Court may order that the sum thereby adjudged to be paid, together with the costs of the conviction or order, and the costs of the appeal, shall be paid out of the money deposited, and that the residue, if any, shall be repaid to the appellant; and, if the conviction or order is quashed, the Court shall order the money to be repaid to the appellant.

"3. The Court to which such appeal is made shall have power, if necessary, from time to time, by order endorsed on the conviction or order, to adjourn the hearing of the appeal from one sittings to another, or others, of the said Court."

Section 752: "When an appeal against any summary conviction or order had been lodged in due form, and in compliance with the requirements of this Part, the Court appealed to shall try, and shall be the absolute judge, as well of the facts as of the law in respect to such conviction or order."

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Section 758: "If upon any appeal the Court trying the appeal orders either party to pay costs, the order shall direct the costs to be paid to the clerk of the peace or other proper officer of the Court, to be paid over by him to the person entitled to the same, and shall state within what time the costs shall be paid."

The grounds on which the motion is based are as follows:—

"(1) The learned Judge, at the time he made said orders, was *functus officio*.

"(2) The special Act under which said appeals were had, provided that the appeal should be 'heard, had, adjudicated upon and decided . . . within thirty days from the date of conviction, unless the said Court or Judge extends the time for hearing and decision beyond such thirty days.' Said decision was not given within thirty days, nor was the time extended."

It seems to me that, if called upon to do so, and if I had the power to do so, I would hold that the learned County Court Judge had sufficiently extended the time for the hearing and decision of the appeals, and was still seized of the matter at the time he gave judgment.

The other grounds are:—

"(3) The learned Judge of the County Court did not find, as he is required to do, the amount of costs, if any, that the appellant should pay, nor did he, in what purported to be his final order dismissing each of the said appeals, state what was the amount of the costs, if any, which the appellant should pay; but directed the same to be taxed by the clerk of the County Court of the County of Huron.

"(4) The said learned Judge, having made his final order without fixing said costs, is now *functus officio*, and has no power to set aside, vary, or substitute another order for the one of the 30th April, 1910.

"(5) The clerk of the County Court had no jurisdiction to tax the costs of said appeals under said orders."

It seems to me also that, if called upon to do so, and if I had the power to do so, I would hold that it was the duty of the learned County Court Judge himself to fix the amount of the costs when disposing finally of the appeals, and that he was not warranted in delegating the taxation thereof to the clerk of the County Court, nor could the latter finally tax the same and fix the amount thereof. The County Court Judge might have availed himself of the assistance of the clerk in arriving at the proper amount of costs to be allowed, but he himself should pass judgment upon and fix the said amounts: *Regina* v. *McIntosh* (1897), 28 O.R. 603. Perhaps it is not too late for him to do this, upon a reconsideration and amendment of the orders.

Now, prohibition is a remedy that should be sparingly applied, and only in a plain case: *Re Cummings and County of Carleton* (1894), 25 O.R. 607, 26 O.R. 1. The appeal in this case was

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decided on the merits without affecting the general proposition as to prohibition being an extreme measure. See also *In re Grass v. Allan* (1866), 26 U.C.R. 123.

In the matters in question, the judgment of the County Court Judge is under sec. 752 quoted above, and is a final judgment.

I assume that on the merits the convictions are right and should stand.

Apart from the question of the power of the Judge having been exhausted, in so far as the appeals were concerned, at the time he gave judgment, on the 30th April, this matter is mainly one as to costs.

I am not clear that the remedy asked for, namely, prohibition, is one that should be applied, even if I had the power in this particular case to grant that remedy.

I think, on the whole, the best course to take is to enlarge the matter for ten days, during which the County Court Judge may be applied to, if the respondent desires, to amend the orders in question, by himself fixing the amount of costs which he thinks should be allowed. If that is done, the motion will be dismissed without costs, unless either party desire to speak to the question of costs, in which case they may have leave to do so.

Argument

W. Proudfoot, K.C., for the defendant. The learned Judge, at the time he made the order appealed from, was *functus officio*. The special Act under which these appeals were had, provided that the appeal should be "heard, had, adjudicated upon and decided . . . within thirty days from the date of conviction, unless the said Court or Judge extends the time for hearing and decision beyond such thirty days." The decision here was not given within thirty days, nor was the time extended: *Re Rowland and McCallum* (1910), 22 O.L.R. 418; *In re Township of Nottawasaga and County of Simcoe* (1902), 4 O.L.R. 1; *Re Bothwell v. Burnside* (1900), 31 O.R. 695; *Midland R.W. Co. v. Guardians of Edmonton Union*, [1895] 1 Q.B. 357; *Regina v. McIntosh*, 28 O.R. 603; *In re Rush and Village of Bobcaygeon* (1879), 44 U.C.R. 199; *In re McCumber and Doyle* (1867), 26 U.C.R. 516; *The Queen v. Murray* (1867), 27 U.C.R. 134; Seager's Magistrates' Manual, 2nd ed., pp. 75, 78; *Re Chapman and City of London* (1890), 19 O.R. 33; *Farquharson v. Morgan*, [1894] 1 Q.B. 552. The learned Judge of the County Court did not find, as he is required to do, the amount of costs, if any, that the appellant should pay, nor did he, in what purported to be his final order dismissing each of the appeals, state the amount of the costs which the appellant should pay, but directed the costs to be taxed by the clerk of the County Court. Having made his final order without fixing the costs, the Judge is now *functus officio*, and has no power to set aside, vary, or substitute another order for, that of the 30th April, 1910. The clerk of the County Court had no jurisdiction to tax the costs of the appeals under the orders.

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Argument

M. G. Cameron, K.C., for the respondent. The Judge had jurisdiction when he made the orders of the 30th April, 1910. He may have made a mistake in not fixing the amount of the costs, but that is not a subject for prohibition. When a Judge has jurisdiction, the transgression of a rule of practice forms no ground for prohibition: *Fee* v. *McIlhargey* (1882), 9 P.R. 329; *Martin* v. *Mackonochie* (1878), 3 Q.B.D. 730; *Ex p. Story* (1852), 12 C.B. 767, at p. 777.

Proudfoot, in reply.

Britton, J.

May 10, 1912. BRITTON, J.:—All the facts involved in these three cases are fully set out in the judgment of Sutherland, J.

There is not any further appeal on the merits, and we must assume that the defendant was properly convicted. The convictions were upon informations laid under R.S.C. 1906, ch. 85; and the defendant appealed under sec. 335 of the same Act. The appeals were properly lodged in due form, and were to the County Court of the County of Huron. The convictions are dated the 11th January, 1910. In case of appeal the Act requires that it be taken within ten days, and the trial of the appeal must be within thirty days from the date of conviction "unless the said Court or Judge extends the time for hearing and decision beyond such thirty days." An extension of time for hearing necessarily involves an extension of time for decision. Where there is any conflict or discrepancy as to what actually took place in formally extending the time, or in fact as to the action of a Judge or Court officer in any matter of routine, the presumption that all was done rightly should prevail. Where, as in this case, the Judge had the power to extend the time, and acted as if such extension was actually made, it would require a very strong and clear case to warrant prohibition because of the omission formally to announce or make a memorandum in writing of an extension of time for doing what afterwards was done. As to this objection—and also as to the objection that the Judge did not himself fix the amount of costs—I have, to say the least of it, grave doubts as to the applicability of the cases cited.

I have given every consideration in my power to the very full and complete arguments addressed to the Court by counsel. I have read the cases cited—and I have carefully considered the judgment of my brother Sutherland and his reasons for refusing the motion. The conclusion reached by me is, that it is not a proper case for prohibition.

As I have, since going over this case, had an opportunity of reading the reasons for decision of my brother Riddell—and as I agree that the appeal should be dismissed—I need not attempt to give further reasons. I may add this, that it should be only where there is absolutely no doubt, that a party litigant, invoking the aid of the Court to get rid of a conviction, should, after going

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a certain length and being likely to fail, stop short and deny the right of the Court to go further.

The appeal should be dismissed with costs.

RIDDELL, J.:—An appeal from the decision of my brother Sutherland, the defendant contending that he is entitled to prohibition forthwith. Sufficient reason has been shewn for the delay in taking the appeal. The facts are set out accurately and in sufficient detail by the learned Judge. I mention the important dates, etc.

The defendant was on the 11th January, 1910, convicted before the Police Magistrate at Goderich, under sec. 321 of R.S.C. 1906, ch. 85; an appeal was taken (17th January), under sec. 335 of the Act, to the County Court of the County of Huron; the matter came on before the Judge of that Court on the 7th February, and that learned Judge, upon that day, made the following order: "I hereby extend the time for hearing the appeal herein for ten days from this date." On the 17th February, the hearing was enlarged to the 17th March; then on the 10th March, to the 22nd March; and upon the 22nd and 23rd March the appeal was heard. (There were in reality three convictions, appeals, etc., but I treat them all as though there were only one.)

It is said that an enlargement was made for argument till the 28th March, and then till the 29th March; but this is denied. A note appears in the clerk's book of the enlargement till the 28th March. After argument—it is not pretended that full opportunity for argument was not afforded and taken advantage of—judgment was reserved, and on the 30th April the learned Judge handed out his judgment: "I affirm the conviction . . . and order that the sum thereby adjudged to be paid, together with the costs of the said conviction and the costs of this appeal, shall be paid out of the money deposited by the said appellant," etc., etc.

The informant thereupon filed his bills of costs, which, on the 16th June, were taxed by the clerk of the County Court, over the protest of the defendant. On the 9th June, formal orders were taken out, dated the 30th April, and copies filed in the office of the clerk on the 16th June; these were to the following effect:—

"2. This Court doth order that the said appeal be and the same is hereby dismissed, and the said conviction affirmed, with costs to be paid by the appellant to the respondent; such costs to be taxed according to the scale of costs taxable in this Court, and such costs to be taxed by the clerk of this Court.

"3. And this Court doth further order that such costs when so taxed be paid by the appellant to the clerk of this Court to be paid over by the said clerk to the respondent.

"4. And this Court doth further order that such costs be paid by the appellant within one week of the day upon which the same are so taxed as aforesaid."

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A motion was made "for an order that the respondents, the King, Merrit R. Baker, Bernard Lewis Doyle, Esquire, Judge of the County Court of the County of Huron, and Daniel McDonald, clerk of the said Court, be prohibited from taking any further proceedings in the said actions, or upon three certain orders made therein, bearing date the 30th day of April, 1910, and intituled 'In the County Court of the County of Huron,' . . . on the following amongst other grounds: (1) The . . . Judge . . . was *functus officio;* (2) . . . the . . . decision was not given within thirty days, nor was the time extended; (3) the . . . Judge . . . did not find . . . the amount of costs . . . ; (4) the Judge, having made his final order . . . is now *functus officio* . . . ; (5) the clerk . . . had no jurisdiction to tax the costs . . ."

Passing over the novelty of asking prohibition against the King, the story continues: the motion came on before my brother Sutherland, who, for reasons given in his judgment, made the following order:—

"1. It is ordered that this motion be enlarged for ten days, during which time the Judge of the County Court may be applied to, if the respondent desires, to amend the orders in question by himself fixing the amount of costs which he thinks should be allowed.

"2. It is further ordered that, if said course is taken, this motion be dismissed without costs, unless either party desires to speak to the question of costs, in which case they may have liberty to do so."

Apparently the County Court Judge was applied to, although with what result (or even that he was applied to at all), we are not informed.

The defendant appeals from this order, and presses much the same grounds as were urged before Mr. Justice Sutherland.

Very many cases were cited, either by name or by reference, and it becomes necessary to see how the decided cases affect the present, if at all.

In considering and applying these many cases referred to expressly or by implication, regard must be had to the history of the legislation.

While, at least in some cases, the appeal to the Sessions from convictions by persons having jurisdiction similar to that of Justices of the Peace, goes back to the time of the Restoration, 12 Car. II. ch. 2, and from convictions by Justices of the Peace to 22 Car. II., no power was given to award costs until 1697: 8 & 9 Wm. III. ch. 30, by sec. 3, allows and directs the Justices in the Sessions, "at the same Quarter Sessions," to "award and order to the party, etc. . . . such costs and charges in the law as by the said Justices in their discretion shall be thought most reasonable and just . . ." As this applied only to certain

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named appeals, a new provision was made in 1849, by 12 & 13 Viet. (Imp.) ch. 45, sec. 5: "That upon any appeal to any Court of General or Quarter Sessions of the Peace the Court before whom the same shall be brought may, if it think fit, order and direct the party or parties against when the same shall be decided to pay to the other party or parties such costs and charges as may to such Court appear just and reasonable . . ." It was under this statute that most of the English cases were decided; and they laid down (1) that the same Court which decided the case should fix the costs. As Lord Halsbury says in *Midland R.W. Co.* v. *Guardians of Edmonton Union*, [1895] 1 Q.B. 357, at p. 362, "the Legislature knew very well that, whatever may be the identity of the court as an abstraction, it occasionally consists of different persons, and they [*i.e.*, the Legislature] have accordingly provided that the power to order costs shall be exercised by the Court before which the appeal is tried." And (2) the Court must fix the costs and not delegate this judicial duty to a clerk.

As is shewn in *Re Bothwell* v. *Burnside*, 31 O.R. 695, at p. 702, it soon became the practice for the clerk to tax the costs, and for the Court to adopt the amount taxed by him, and include it in their order; but this had to be done during the same sessions. It then became the practice for parties to consent to the taxation out of sessions and the insertion then of the amount in the order; in case of such consent, the Courts would not permit the fact that the taxation was out of sessions to be taken advantage of, and the slightest evidence of such consent was considered enough, as the practice was so very common. I do not follow out the Imperial legislation: the practice is substantially founded on Baines' Act, 12 & 13 Viet. ch. 45, already referred to: and the curious may find all the legislation mentioned in Paley on Summary Convictions and Scholefield & Hill's Appeals from Justices.

In Upper Canada, the first Act of any significance is (1850) 13 & 14 Viet. ch. 54, which, by sec. 1, gave an appeal to the "next Court of General Quarter Sessions of the Peace . . . and the Court *at such sessions* shall hear and determine the matter of such appeal, and shall make such order therein, with or without costs to either party, as to the Court shall seem meet . . ." the appeal was tried by a jury: sec. 2. A change was made in 1859, at the consolidation, but merely verbal—the appeal is to the "first Quarter Sessions of the Peace"—the rest is as before: C.S.U.C. 1859, ch. 114, sec. 1: the trial still is by jury, if either party desires. It was under this legislation, *i.e.*, where the Court must proceed "at such sessions," that some of our cases were decided: *In re McCumber and Doyle*, 26 U.C.R. 516; *The Queen* v. *Murray*, 27 U.C.R. 134.

Then came the Act to assimilate the practice of the Provinces of Canada (1869), 32 & 33 Viet. (D.) ch. 31. This, by sec. 65, provided for an appeal to the "next Court of General or Quarter

Sessions," and provided that "the said Court shall hear and determine the matter of the appeal, and shall make such order therein, with or without costs to either party, as to the Court seems meet . . ." The trial continues to be by jury, if either party so desires: sec. 66.

In re Rush and Village of Bobcaygeon, 44 U.C.R. 199, was decided under this statute by Cameron, J. (afterwards Sir Matthew Cameron, C.J.): "It seems clear . . . that the Court of Quarter Sessions at which the appeal is heard must determine . . . whether costs are to be paid: secondly, what costs, that is, costs of the Court below, or magistrate's Court, or costs of the appeal, or both, and when such costs should be paid. The clerk of the peace may tax the costs at any time during the then sitting of the Sessions, or at any adjourned sitting thereof; but it would seem clear, upon the authorities, the Court must adopt his taxation, and that an order made without such adoption would be invalid."

Then came, after certain legislation, the Code of 1892, 55 & 56 Vict. ch. 29, consolidating 51 Vict. ch. 45, sec. 8, and 53 Vict. ch. 37, sec. 24. This, in sec. 880, provides for an appeal, in practically the same words as are found in the present Code, secs. 750, 751.

It was under the Code of 1892 that *Re Bothwell* v. *Burnside*, 31 O.R. 695, came on for decision. There the appeal was to the Court of General Sessions of the Peace for the County of Kent sitting on the 13th June, 1899, adjourned to the 29th June, judgment reserved until the 4th July, 1899—the sittings of the Court being then adjourned until the 10th July, and ending that day. On the 4th July, 1899, the Chairman gave judgment: "Appeal in this case dismissed with costs to be taxed by the clerk of the peace within five days." Taxation of costs began on the 8th July, and was closed on the 13th July; at the next sittings, on the 12th December, an order was made for a warrant of distress. An order *nisi* was obtained calling upon the chairman, the clerk of the peace and the informant, to shew cause why any and every order issued and direction made by the Chairman in connection with the matter of the appeal should not be quashed. No formal order had been drawn up and made in pursuance of the minute. The Court (Armour, C.J., and Street, J.) held that a formal order should have been drawn up "in compliance with the Criminal Code, sec. 880 (*e*), and sec. 897, and which should have contained the amount of the costs awarded." And, accordingly, the certificate of the clerk of the amount of the costs and that they had not been paid, and the order of the Sessions made in December, were quashed. But the Court proceeded to say that, while the costs under sec. 884 (now sec. 755) would have to be taxed and included in the order of the Court during the sittings of the Court, unless taxed out of Sessions by consent, there is no such restriction of the power of the Court under sec. 880 (*e*), (*f*), now secs. 750,

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751, to the same sittings of the Court for which notice of appeal has been given. The Court of General Sessions being a continuing Court, there is "no reason why at the next sittings of the Court of General Sessions of the Peace for the County of Kent the formal order should not be drawn up and made in pursuance of the said minute, and the costs included therein *nunc pro tunc* if necessary:" p. 704.

It will be seen that the decision of Mr. Justice Rose in *Regina* v. *McIntosh*, 28 O.R. 603, is upon the same statute, as that learned Judge considered that the provisions of secs. 879, 880, must be read into the Act under which the prosecution was brought: see p. 606 *ad init.* He then says: "It seems clear that the costs to be awarded are to be such as appear right in the discretion of the Court. Such sum might be awarded in gross. The discretion of the Court fixes the amount. No reference is made to any tariff, and as none is provided, one may be adopted by the Judge to aid his discretion. . . . The Judge fixes the amount which seems to him to be reasonable. He may think because proceedings were before him as a Judge of the County Court that the tariff of the County Court will be a reasonable guide. . . . The clerk had no power to tax the costs, although the Judge might have had a taxation by the clerk for the purpose of assisting him in fixing the amount. Whatever sum the clerk might have certified to him as allowable under any tariff, the Judge might adopt as reasonable or he might not . . . The amount to be named is to be determined in the discretion of the Judge . . . and I have no jurisdiction vested in me to review his discretion . . ."

Giving these decisions their full force, and assuming that they apply to the present, what is the result?

The appeal is to the County Court, under sec. 335 of R.S.C. 1906, ch. 85: this section provides: "2. The trial on any such appeal shall be heard, had, adjudicated upon and decided, without the intervention of a jury, at such time and place as the Court or Judge hearing the trial appoints, and within thirty days from the date of conviction, unless the said Court or Judge extends the time for hearing and decision beyond such thirty days."

The perfectly general "time" for trial is not limited at all, if the Judge does extend the time beyond "such thirty days."

Even supposing the very stringent rule laid down in *Power* v. *Griffin* (1902), 33 S.C.R. 39, to apply, and the power to extend exercisable only once; and supposing the large powers given in the Code, sec. 751 (3), cannot be exercised by the Judge here, I am of opinion that the order extending the time to ten days after the 7th February, that is, to the 17th February, more than thirty days after the conviction, made the time wholly at large and wholly in the discretion of the Judge. The extension of the time for hearing the appeal necessarily was an extension of the time for

decision as well—and consequently the order of the 7th February was an order "extending the time for hearing and decision," under sec. 335 (2).

The Judge could sit at any time to hear, adjudicate upon, and decide anything and everything the law called upon him to hear, adjudicate upon, and decide.

That he had the right to have the clerk tax the costs for his own information is undoubted—if the clerk taxed when the Court was not sitting, this was at most an irregularity (if even that)—the Court could sit again, if necessary, and have the form of taxation gone through, and insert the amount in the order. The Court is not *functus officio* until everything is done which should be done—as there is no time-limit or limit to any particular sittings. The very most that can be said is, that the Judge has not stamped with his approval the amount, and caused that amount to be inserted in the order.

Prohibition is not *ex debito justitiæ*—it is an extreme measure: *In re Birch* (1855), 15 C.B. 743; *Re Cummings and County of Carleton*, 25 O.R. 607, 26 O.R. 1; and is not granted in case of a mere illegality or irregularity not going to the jurisdiction: *Regina* v. *Mayor of London* (1893), 69 L.T.R. 721; or where the judicial officer having jurisdiction goes about it in an irregular manner: *Regina* v. *Justices of Kent* (1889), 24 Q.B.D. 181.

It would, in my view, be absurd to direct prohibition to the County Court Judge, forbidding him to act upon an order which he can make right by a few strokes of his pen.

This consideration is, I think, sufficient to dispose of the appeal—my brother Sutherland's order was practically "Get the Judge to put his order right; if you do, the motion will be dismissed." This is substantially what the Divisional Court did in the case in 31 O.R.—they said that certain unauthorised papers should be quashed, but further said that the whole matter could be set right at the next sittings of the Court; and gave no costs, as they would have done had prohibition lain: *Re McLeod* v. *Emigh* (2) (1888), 12 P.R. 503, and cases cited.

If it were considered that the decisions in cases from the Sessions compelled us to grant prohibition, contrary to the opinion just expressed, further considerations would arise.

The cases in our Courts after the change of the language by the Act of 1850, 13 & 14 Vict. ch. 54—"with or without costs to either party as to the Court shall seem meet"—carried into the new practice what had been and had necessarily been the former practice, viz., that the Court exercised, at least in form, a discretion as to the amount of the costs. In other words, it was considered that "with or without costs to either party as to the Court shall seem meet" meant the same thing as "award . . . such costs . . . as by the said Justices shall be thought most

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reasonable and just' or "such costs and charges as may to such Court appear just and reasonable."

This interpretation was, I think, probably due to the constitution of the Court and the desire to keep the former practice in force. It is too late now (at least for this Court) to change the interpretation to be placed upon the words of the statute in the case of the Sessions, which has had a long series of appeals from very early times, and a settled practice for as long; but the case is quite different where an appeal is given to another Court, whose practice is wholly different and equally well settled, having a tariff well established and officers to apply the tariff.

The Act R.S.C. 1906, ch. 85, sec. 335, gives an appeal to the County Court, as well as to the Sessions, at the option of the appellant, or he may appeal to a Superior Court—the Code, only to the Sessions or in certain cases to a Division Court. And it was to the County Court that the defendant took his appeal.

Suppose now the Act giving an appeal to the County Court had said: "The Court to which such an appeal is made shall hear and determine the matter of appeal and make such order therein, with or without costs to either party, including costs of the Court below, as seems meet to the Court . . ."—would there have been any doubt as to the meaning? Would it not mean that the Court should make such order as seems meet, and that this order should be "with or without costs as seems meet?" Would it be construed as meaning "with or without costs as seems meet, and, if with costs, costs to such an amount as seems meet?" The Court having a legal tariff, could the Court give any other than the tariff costs, if any? Making an order "with costs" means with the costs taxable between party and party in the Court making the order, if nothing more be said. It could not be successfully argued, I think, under such legislation, that the Court could give solicitor and client costs or costs on the High Court scale: *O'Farrell* v. *Limerick and Waterford R.W. Co.* (1849), 13 Ir. L.R. 365; *Re Bronson and Canada Atlantic R.W. Co.* (1890), 13 P.R. 440; or any more, in any case, than the taxable party and party costs in the County Court.

It may well be that a choice was given in this Act of going to the County Court rather than to the Sessions, from just such considerations—the appellant would know pretty well the worst that could happen to him: and I see no impropriety in making the orders complained of. If it were not for the practice in the other Court, due, as I venture to think, to historical and other considerations, wholly wanting in the case of the County Court, no one would have thought that the language of the statute had any other meaning than that I am now suggesting.

At all events, there is such "doubt in fact (and) law whether the inferior Court is exceeding its jurisdiction, or is acting without jurisdiction," that we should exercise the discretion we have

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"to refuse a prohibition:" Brett, J., in *Worthington* v. *Jeffries* (1875), L.R. 10 C.P. 379, at p. 384. If the Court doubt as to what is the true state of the facts or as to the law applicable to recognised facts, it is indisputable that the Court may decline to proceed further.

See also *Re Forster* v. *Forster and Berridge* (1863), 4 B. & S. 187, cited in the case in L.R. 10 C.P.; *Ex p. Smyth* (1835), 3 A. & E. 719, *per* Littledale, J., at p. 724; *Martin* v. *Mackonochie* (1879), 4 Q.B.D. 697, 734, *per* Thesiger, L.J.; *Carslake* v. *Mapledoram* (1788), 2 T.R. 473, *per* Buller, J.; *Bassano* v. *Bradley*, [1896] 1 Q.B. 645, *per* Russell, L.C.J.; *Ricardo* v. *Maidenhead Local Board of Health* (1857), 2 H. & N. 257, *per* Pollock, C.B.; *In re Birch*, 15 C.B. 743, *per* Jervis, C.J.

This consideration also enters into the case upon the earlier branch.

I am of opinion that the appeal should be dismissed with costs.

Falconbridge, C.J.

FALCONBRIDGE, C.J.:—I agree in the result.

Appeal dismissed.

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PRAIRIE STOCK FARM CO. Ltd. v. McFATRIDGE.

Nova Scotia Supreme Court, Ritchie, J. August 30, 1912.

1. INJUNCTION (§ I E—44)—WRONGFUL SEIZURE OF GOODS—INJUNCTION TO RESTRAIN—FULL REMEDY IN REPLEVIN OR IN DAMAGES.

An injunction will not be granted to restrain a person from seizing, or from keeping possession of, or from selling, or from advertising for sale, a carriage and three cows claimed by the plaintiff, where he has a full, complete and adequate remedy at law in replevin or in an action for damages.

[*Moren* v. *Shelburne Lumber Co.*, Russell's Equity Decisions, N.S. 134, applied.]

Statement

MOTION for injunction to restrain sale of personal property.

The application was refused.

Jas. Terrell, for plaintiff in support of application.

R. E. Finis, for defendant, contra.

Ritchie, J.

RITCHIE, J.:—The plaintiffs bring this action for damages and for an injunction to restrain the defendant from seizing or from keeping possession of, or from selling or from advertising for sale a carriage and three cows. I granted an *interim* injunction, but when I did so I pointed out to Mr. Terrell that I had very great doubt as to the case being a proper one for an injunction. I now in the exercise of my discretion refuse to continue the injunction. Various reasons suggest themselves to me why this injunction should not be granted, but the obvious ground is that there is complete and full remedy at law. There is no sug-

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gestion in the affidavits that the defendant is not able to respond in damages and if the plaintiff succeeds in this action he will get the value of the carriage and the cows. He also in my opinion had his remedy in replevin. The rule is clear that an injunction will not be granted when the remedy at law is full, complete and adequate. A Court of equity does not ordinarily interfere by injunction except to prevent injury incapable of adequate compensation in damages. It would be an easy task to cite authorities for this position but I think it will be sufficient for me to refer to the case of *Moren* v. *Shelburne Lumber Co.*, Russell's Equity Decisions, p. 134. The late Equity Judge Ritchie said in that case:—

> What we have to consider is whether an injunction should be granted to protect the property and prevent the disposal of it pending the litigation. It seemed to be assumed by the plaintiff's counsel that if the plaintiff shewed a right to the property the injunction would be granted of course. But that is by no means necessarily the case. Before granting an injunction the Court must be satisfied that its interference is necessary to protect him from what is termed irreparable injury until the legal title can be determined. That is, such an injury as is not adequately reparable by damages in an action at law. For if one has a full, complete remedy at law he cannot assert that the damage is irreparable.

The application is refused and an order will pass dissolving the *interim* injunction. The costs will be the defendant's costs in the cause.

Application refused.

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SWAISLAND v. GRAND TRUNK R. CO.

Ontario High Court. Middleton, J., in Chambers. April 3, 1912.

1. DISCOVERY AND INSPECTION (§ IV—31)—EXAMINATION OF OFFICER OF A CORPORATION—REPORT OF ACCIDENT—USE BY CORPORATION'S SOLICITOR—CONCLUSIVENESS OF AFFIDAVIT ON PRODUCTION.

In an examination of an officer of a railway company for the purpose of discovery in an action against the company for personal injuries, a motion to require the company to produce reports of its employees as to the accident which gave rise to the action, is answered by an affidavit made by another officer that such reports stated on their face that they were made only for the information of the company's solicitor and his advice thereon, and such affidavit is conclusive on the question of privilege as far as the motion proceedings are concerned, unless it can be shewn from the documents produced or from the admissions in the pleadings or by the party himself that the affidavit is either untrue or has been made under a misapprehension of the legal position.

[*Savage* v. *Canadian Pacific R. Co.*, 16 Man. L.R. 376, specially referred to.]

2. DISCOVERY AND INSPECTION (§ IV—31)—EXAMINATION OF OFFICER OF A CORPORATION—PRODUCTION OF REPORTS FURNISHED CORPORATION AS TO ACCIDENT—USE BY CORPORATION'S SOLICITOR.

Where the plaintiff in an action against a railway company for personal injuries moved, in the examination of an officer of the com-

pany for discovery, to have produced certain reports to the company as to the happening of the accident which gave rise to the action made by its officials who investigated the same, there is no right under the practice established in discovery proceedings to cross-examine upon an affidavit filed by the officer being examined if such reports were made for the information of the company's solicitor and his advice thereon.

3. DEPOSITIONS (§ I—4 C)—USE OF EXAMINATION FOR DISCOVERY OF OFFICER OF A CORPORATION—CONTRADICTION OF AFFIDAVIT USED ON MOTION TO PRODUCE REPORTS MADE TO COMPANY FOR SOLICITOR'S USE.

It is not competent for the plaintiff in an action against a railway company for personal injuries to use the examination for discovery of an officer of the company for the purpose of contradicting an affidavit filed by such officer in his examination on a motion to require the production of certain reports to the company as to the happening of the accident which gave rise to the action made by its officials who had investigated the same, which affidavit was to the effect that such reports were made for the information of the company's solicitor and his advice thereon.

4. MOTIONS AND ORDERS (§ I—4)—AFFIDAVIT FILED BY OFFICER OF CORPORATION OPPOSING APPLICATION FOR PRODUCTION OF REPORTS OF ACCIDENT—IDENTIFICATION OF REPORTS.

In an examination of an officer of a railway company in an action against the company for personal injuries on a motion to require the production of certain reports of the company as to the happening of the accident on which the action was based, made by the company's officials who investigated the same, an affidavit filed by the officer being examined as to the privileged character of such reports, must set forth and so clearly identify such reports and give names of the officials investigating the accident so that there will be no difficulty in procuring the conviction of the deponent for perjury should it afterwards appear that his affidavit was untrue.

5. DISCOVERY AND INSPECTION (§ I—2)—WHEN FURTHER AFFIDAVIT ON PRODUCTION WILL BE ORDERED—PRIVILEGE OF REPORT MADE BY OFFICIALS TO A CORPORATION FOR USE OF ITS SOLICITORS—SPECIFIC REFERENCE TO SAME IN AFFIDAVIT.

In an examination of an officer of a railway company for discovery in an action against the company for personal injuries where a motion was made by the plaintiff to require the production by such officer of certain reports to the company as to the happening of the accident which gave rise to the action, made by its officials who investigated the same, an affidavit as to the privilege of the reports filed by the officer being examined, must clearly and specifically state that they were provided solely for the purpose of being used by the company's solicitor in any litigation which might arise out of such accident and in the absence of such clear and specific statement a further and better affidavit will be directed to be filed.

Statement

APPEAL by the plaintiff from an order of the Master in Chambers dismissing a motion for an order directing the defendants to produce, on the continuation of the examination of one Whittenberger, certain reports by officials of the defendant company with reference to the accident giving rise to the action, and for an order that the defendant company do file a further and better affidavit on production.

The appeal was allowed in part.

ONT.

H. C. J.
1912

SWAISLAND
v.
GRAND
TRUNK
R. Co.

MIDDLETON, J.

W. E. Raney, K.C., for the plaintiff.
Frank McCarthy, for the defendants.

MIDDLETON, J.:—Upon the happening of the accident in question, the defendants' officials made an investigation, and their reports were in due course sent to the office of the Superintendent of the Eastern Division, Mr. Whittenberger. An affidavit on production has been made, in which, in the second part of the first schedule, are mentioned "reports made for the information of the defendants' solicitor and his advice thereon," and privilege is claimed, upon the ground "that the said reports were made for the information of the defendants' solicitor and his advice thereon, and are, therefore, privileged." This affidavit is made by the treasurer of the company at Montreal, who swears that he has knowledge of all the documents which are in the custody of the defendants and is cognizant of the matters in this action.

Upon the examination of Mr. Whittenberger, the plaintiff claims to have established that this affidavit was untrue, and that the reports were made for the purpose of ascertaining the cause of the accident, quite irrespective of any actions that might or might not be brought by those who were injured. A train was travelling upon the main line of the company between Toronto and Montreal, and the accident took place where the track was apparently in first-class condition; and for no ostensible reason the train left the rails. It is suggested that the investigation was made for the purpose of ascertaining the cause of the accident, so that the company might guard against the recurrence of such accidents and so profit by the experience; and that the fact that the reports would be of use if litigation ensued, though possibly one reason for the investigation, was certainly not the sole reason, perhaps not even the main reason.

By affidavit filed upon this motion, Mr. Whittenberger discloses that these reports on their face state that they are "for the information of the company's solicitor and his advice thereon."

This is not in itself conclusive—see *Savage* v. *Canadian Pacific R. Co.*, 16 Man. L.R. 376, at p. 386—and one cannot help feeling that companies operating railways have sometimes adopted the expedient of having this statement printed at the head of all blanks supplied for casualty reports and investigations, to lend colour to an otherwise unjustifiable claim of privilege.

I have come to the conclusion, however, that I cannot, on this motion, go into this question of fact; because it has been established that the affidavit on production is conclusive, unless it can be shewn, from the documents which have been produced, or from the admissions in the pleadings or by the party himself,

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that the affidavit is either untrue or has been made under a misapprehension of the legal position. Under the practice here, there is no right to cross-examine upon an affidavit on production; and I do not think that it is competent for the plaintiff to use the examination for discovery of an officer of the corporation for the purpose of contradicting the affidavit. The function of the examination of an official or servant of a corporation before the trial is purely discovery. Where a party is himself examined, his statements can be used against him as admissions; but the statements made by an officer or servant of a company cannot be regarded as admissions by the company; and to allow such examination to be used for the purpose of contradicting the affidavit on production would be to admit controversial material—the precise thing that cannot be done, according to a series of cases too well-known to require discussion.

Then it is said that the affidavit on production itself is not satisfactory. The documents are not set forth and identified, and privilege is not sufficiently claimed.

I think that the reports should be set forth more precisely. There can be no reason why the name of the officer investigating should not be given. The plaintiff may desire to go into the defendants' camp in his search for the cause of the accident; and it is certainly fair that he should know the names of the officers who investigated and reported. Moreover, it is essential that the documents should be so clearly identified that, if it turns out that the affidavit on production is untrue, there will be no difficulty in securing a conviction for perjury. As the affidavit now stands, it is so vague and uncertain that, to say the least, a trial upon any such charge would be most embarrassing.

Then, I think, the claim for privilege should be more clearly and specifically stated. The deponent should state that these reports were provided solely for the purpose of being used by the company's solicitor in any litigation which might arise out of the accident in question. I was told that this branch of the motion had not been argued before the learned Master. His recollection agrees with this.

The appeal is, therefore, allowed, to the extent of directing the defendants to file a further and better affidavit on production. The costs here and below are in the cause to the successful party.

Appeal allowed in part.

SASK.

S. C.

1912

Aug. 31.

THE BRANDON CONSTRUCTION COMPANY v. SASKATOON SCHOOL BOARD.

Saskatchewan Supreme Court. Trial before Wetmore, C.J. August 31, 1912.

1. CORPORATIONS AND COMPANIES (§ IV D 3—85)—RIGHT OF TRADING COMPANY TO CONTRACT WITHOUT THE SEAL OF THE COMPANY.

A contract by a trading company entered into for the purpose for which the company is incorporated need not be under the common seal of the company.

[*Clarke et al.* v. *Cuckfield Union*, 21 L.J.Q.B. 349; *Henderson* v. *Royal Mail Navigation Co.*, 5 E. & B. 409; and *South of Ireland Colliery* v. *Waddle*, L.R. 3 C.P. 463, referred to. See also Lindley on Companies, 6th edition, vol. 1, p. 271; and Halsbury's Laws of England, vol. 8, p. 383.]

2. CORPORATIONS AND COMPANIES (§ IV G 2—115)—POWERS OF OFFICERS OF TRADING CORPORATION—CONTRACT FOR PURPOSE OF WHICH COMPANY WAS INCORPORATED—ABSENCE OF CORPORATE SEAL.

A trading company is bound by acts of its officers done in the course of negotiations for a contract for the purpose for which it is incorporated, and its common seal is not necessary.

3. CORPORATIONS AND COMPANIES (§ IV D I—75)—POWERS—CONTRACTING WITHOUT CORPORATE SEAL—EXCEPTION—MEANING OF "TRADING COMPANY"—BUILDING COMPANY.

For the purpose of the exception to the general rule that contracts of corporations must be made under the corporate seal, the meaning of the expression "trading company" is not confined to companies with the object of barter, and a building company is a "trading company" within the meaning of the exception.

4. CORPORATIONS AND COMPANIES (§ IV G 2—116*a*)—POWERS OF MANAGER—HOLDING OUT AS HAVING AUTHORITY—ACTS USUAL FOR MANAGER TO DO—BINDING EFFECT ON COMPANY.

Where the managing director of an incorporated company in Saskatchewan holds himself out as having authority to do certain acts, which are not unusual for the managing director of such a company, the company will be bound by such acts.

5. CORPORATIONS AND COMPANIES (§ IV G 2—116*a*)—POWERS OF MANAGER—ACCEPTANCE OF TENDER FURNISHED BY CORPORATION—DEPOSIT—FAILURE TO EXECUTE SUBSEQUENT CONTRACT—FORFEITURE OF DEPOSIT—RECOVERY BACK.

Where a school board calls for tenders for the construction of a building upon the terms that a marked cheque for a proportion of the tender should accompany the tender and be forfeited if the successful tenderer should fail to execute a contract within 3 days of receipt of notice of acceptance of his tender, and the successful tenderer, an incorporated company, refuses to sign a contract for the amount named in its tender, because of an error in its estimates, it cannot recover the amount of its deposit on the ground that it has made no contract under its seal with reference thereto, and that the authority of its managing director, who signed the tender and conducted the negotiations on its behalf, was confined to the making of the tender, and did not extend to agreeing to the condition as to the forfeiture of the deposit.

Statement

THIS is an action to recover the sum of $2,000 deposited by the plaintiffs (a company incorporated under the laws of the province of Manitoba) with the defendants, which deposit accompanied a tender for the erection of a school building in the city of Saskatoon. The tender was accepted conditionally by the

defendants, but the formal contract was never executed owing to an error having been made by the plaintiffs in their estimates.

The action was dismissed.

P. E. Mackenzie, for the plaintiffs.
E. W. Shannon, for the defendants.

WETMORE, C.J.:—The defendants' architect by notice advertised in newspapers published in Saskatoon and Winnipeg called for tenders for the erection (exclusive of plumbing, heating and ventilation) of a school-house to be erected on Victoria school site in the city of Saskatoon. Such tenders were to be addressed to the defendants' secretary, and the notice further provided that tenders were to be accompanied by a marked cheque for five per cent. of the amount of the tender, which amount would be forfeited to the school district if the successful tenderer failed to sign a contract within three days of receipt of notice of acceptance of his tender, and also to enter into a bond according to the specifications satisfactory to the board for the due completion of the work. It also set forth that plans and specifications could be seen at the office of the architect and the Winnipeg Builders' Exchange. A copy of the plans and specifications were sent to the Winnipeg Builders' Exchange. The specifications provided that certificates for payment would be issued every thirty days, and also that no tender would be considered unless accompanied by a marked cheque for five per cent. of the amount of the tender, and that cheques would be returned to unsuccessful tenderers after the successful tenderer had signed the contract and furnished bonds satisfactory to the Board; the amount of bond to be furnished to be twenty-five per cent. of contract for completion of all work.

The plaintiffs are a company incorporated under the laws of Manitoba, having its head office at Brandon in that province. There is no direct evidence as to the purposes for which it is incorporated, but in view of the fact that it is a member of the Winnipeg Builders' Exchange, and that such exchange is an organization of architects and contractors established for the purpose of enabling its members to get into touch with proposed buildings, and that the plaintiffs tendered for the construction of the defendants' school-house, I assume that it is a building company, and therefore a company in the nature of a trading company within the meaning of the cases to which I will hereafter refer. The word "trade" especially in England where those decisions were made is not confined to barter. A person or corporation engaged in building operations is engaged in trade. Moreover, the principle of the cases I refer to is quite applicable to a corporation such as the plaintiffs. This company has a board of directors and the following officers:—President, vice-president, managing director and secretary-treasurer.

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Thomas Harrington is the managing director. The plaintiffs sent in a tender for the erection of the school-house a copy of which is as follows:—

TENDER.

Brandon, May 24th, 1911.

Estimate No. 222.

The Saskatoon School Board,
Saskatoon, Sask.

Sir,—We the undersigned hereby propose to execute the several works required in the erection of a proposed building to be erected for school purposes at Nutana for the Saskatoon School Board and in accordance with plans and specifications prepared by D. Webster, Esq., as Architect, for the sum of:—

Forty-five thousand dollars ($45,000.00).

This tender does not include plumbing or heating.

Enclosed cheque for $2,000.00 as a guarantee of good faith.

Payment to be made every two weeks to the extent of at least 80 per cent. of the amount of work done and material supplied, the balance to be paid within thirty days after the work is completed.

It is a condition of this tender that if any contract is entered into it shall be that known as the Uniform Contract adopted by the Winnipeg Builders' Exchange.

(Sgd.) THE BRANDON CONSTRUCTION CO. LTD.
Managing Director.

The tender was put in on behalf of the plaintiffs by the managing director and he was the only witness called on behalf of the plaintiffs, and I find from his testimony that he and his son, the secretary-treasurer, happening to be at the Winnipeg Builders' Exchange, the secretary of the exchange called their attention to the fact that there were some plans there for them to figure on, and they saw such plans and the specifications and figured on them. Of course, therefore, they must have known the contents of the specifications because they could not well do the figuring without knowing what the specifications contained. Harrington swore that they never saw the call for tenders, and the only way they became aware of the fact that a five per cent. deposit was called for was because his son enquired of the secretary of the exchange if the usual deposit of five per cent. was to be put up and he was informed that it was. I must say that I have a strong suspicion that these gentlemen must have also got some knowledge that a deposit of five per cent. was required from reading the specifications. Both the Harringtons must have been aware that the tenders were asked for in the response to a call, for in the letter of 24th May, 1911, accompanying the tender they state, "you will also note that our cheque is for $2,000.00 instead of the five per cent. that is called for." I must say that I view the testimony of Mr. Harrington as to his never having seen the call with considerable suspicion to say the least, but I will not go so far as to say I

do not believe him. But I will state this that knowing, as Mr. Harrington evidently did know, that there was a call for tenders, I would have, if necessary, no hesitation in holding that he ought to have satisfied himself of the nature of the call, and that the defendants would be quite justified in assuming that he did so, and that the marked cheque was forwarded with the intention of its being dealt with as mentioned in the call, and that the plaintiffs cannot set up ignorance of the contents of the call as an excuse. Mr. Harrington swore that he had authority to put in the tender, and so far as I can perceive according to his testimony that was about the only thing he had authority to do, at any rate in so far as the company's dealings with other persons are concerned. The admission of the authority to forward the tender could not be very well avoided, because the fact that the tender was made by the plaintiffs is alleged in the statement of claim. The action is brought for money had and received, and the particulars set out in such claim are as follows:—

1911. May 24.

To amount which the plaintiffs enclosed to the defendants as a guarantee of good faith with a certain tender of the above date, whereby the plaintiffs proposed to erect a building for school purposes for the defendants at Nutana. The defendants received and retained the said amount but never accepted said tender.

$2,000.00.

I will now deal further with the question of the purpose for which the $2,000.00 deposit in question was made, and assuming that I am in error in holding, as I have hereinbefore held, that the defendants were justified in assuming that it was deposited in response to their call for tenders, and that the plaintiffs could not set up ignorance because they had not seen the call. We have it alleged in the statement of claim that the "amount was enclosed to the defendants as a guarantee of *good faith* with a certain tender, etc." This is in accordance with what is alleged in the tender. Let me ask, good faith in what respect? It was not good faith in doing the work in respect to which the tenders were called for, because that, according to the specifications (which as I have before stated the plaintiffs' manager had read) was to be secured by the bond hereinbefore mentioned. I can only read the "guarantee of good faith" as meaning that the tender was made in good faith, and if accepted the plaintiffs would enter into the necessary contract. That was practically admitted by Harrington on his examination for discovery and I hold that if the tender was accepted and the plaintiffs refused to enter into the contract, the defendants are entitled to retain the money sued for herein. But it is claimed that this particular tender with which the deposit was accompanied was not accepted by the defendants. Nearly all the questions raised by the plain-

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tiffs as to this non-acceptance are based upon the contention that neither the plaintiffs nor the defendants, being corporations, can contract or negotiate with a view to a contract except under the corporate seal. The principal case relied on for this contention was *Manning* v. *The City of Winnipeg*, 15 W.L.R. 33, and affirmed by the Court of Appeal for Manitoba, *Manning* v. *City of Winnipeg*, 21 Man. R. 203, 17 W.L.R. 329.

I have carefully read the very able and exhaustive judgment of the learned Chief Justice of the King's Bench for Manitoba, and the judgments of the learned Judges of the Court of Appeal. It is not necessary for me to state whether I concur in the result arrived at by these judgments, because I am of opinion that they do not deal with a question similar to the one before me. The question involved in that case was whether a person who claimed to have performed services for a municipal corporation by virtue of a paid engagement could recover for such services. The Court held he could not because the engagement, or in other words the contract, was not under the seal of the corporation. In this case the defendant company is resisting an attempt to force it to return money paid in with a written document admitted to have been properly made by the plaintiff company by its agent, by which the defendants, it is claimed, have the right to retain the money under certain conditions which have arisen; moreover the Manitoba Court was dealing with the case of a contract made by a municipal corporation such as the city of Winnipeg and corporations exercising a public function or duty of somewhat similar character.

I have stated in a preceding part of this judgment that the plaintiff company is a trading corporation; that such a corporation can contract under certain circumstances through its officers, and without the formality of attaching its seal is as it seems to me supported by numerous decisions. I will merely refer to some of them. They are *Clarke et al.* v. *Cuckfield Union*, 21 L.J.Q.B. 349; *Henderson* v. *Royal Mail Navigation Co.*, 5 E. & B. 409, and *South of Ireland Colliery* v. *Waddle*, L.R. 3 C.P. 463, from which I quote an extract from the judgment of Bovill, C.J., at p. 469, as it seems to me very clear and explicit on the subject:—

> Originally all contracts by corporations were required to be under seal. From time to time certain exceptions were introduced, but these for a long time had reference only to matters of trifling importance and frequent occurrence, such as hiring of servants, and the like. But in progress of time as new descriptions of corporations came into existence, the Courts came to consider whether these exceptions ought not to be extended in the case of corporations created for trading and other purposes. At first there was considerable conflict, and it is impossible to reconcile all the decisions on the subject. But it seems to me that the exceptions created by the recent cases are now too firmly established to be questioned by the

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earlier decisions, which if inconsistent with them, must I think be held not to be law. These exceptions apply to all contracts by trading corporations entered into for the purposes for which they are incorporated. A company can only carry on business by agents, managers and others; and if the contracts made by these persons are contracts which relate to objects and purposes of the company, and are not inconsistent with the rules and regulations which govern their acts, they are valid and binding upon the company, though not under seal.

What I have held is supported by such eminent authorities as Lord Lindley and Lord Halsbury. See 1 Lindley on Corp., 6th ed., 271, and 8 Halsbury's Laws of England 383. I do not know that it was necessary to deal with this question of the power of trading corporations to contract through their officers, because the acts questioned in this case were not the making of contracts, but were preliminary acts in negotiations with a view thereto or declaring the agreed consequences of a default. The question is how far the respective companies and others may be bound by such acts although they were not under seal. But I submit that if what I have held in respect to the making of contracts by trading or similar corporations is good law *a fortiori*, it would be good law in respect to such last mentioned acts. In order to understand what I mean it will be necessary to state further facts which I find in this case. It will be observed that it was a condition of the tender that if any contract was entered into it should be that known as the uniform contract adopted by the Winnipeg Builders' Exchange.

Notice of conditional acceptance of the tender was sent by wire from Bate the defendants' secretary which stated that it was accepted subject to the plaintiffs signing "Saskatoon School Board's Standard Contract" and in all respects complying with specifications of the Saskatoon architect. (I will note here that evidently both parties contemplated a formal contract being drawn up and I have no doubt that it was intended, and properly so, that such formal contract should be under the seal of the respective parties.) This notice was sent on the 25th May addressed to the plaintiffs at Brandon, and next day the defendants' secretary got a reply also by wire purporting to be sent by the plaintiffs stating that they were willing to sign the standard contract. The last mentioned telegram was sent by the secretary-treasurer of the plaintiff company, but I am very much inclined to think that the managing director was aware of its contents before it was sent; at any rate he was in Saskatoon on the 27th May, and was then aware that the telegram had been sent and of its contents. When the managing director was in Saskatoon on that occasion he was present at a meeting of the school board, all the trustees being present, when the specifications were produced, and after a few alterations suggested by Harrington

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were made therein, the first page of them was signed by him by his name in full, and all the other pages with his initials in token of his approval thereof. The Saskatoon School Board's Standard Contract was also produced; he raised no objection to it and took it away with him to Brandon with the avowed purpose of having it sealed with the seal of the plaintiff company. On arriving at Brandon it was discovered that an error had been made in the tender against the plaintiffs by omitting an item of cut stone amounting to $3,000.00 and upward and thereupon the following telegram was sent to the defendants' secretary-treasurer:—

Brandon, May 29, 1911.

To W. P. Bate, Sect.-Treas.,
Saskatoon School Board,
Saskatoon.

Have omitted cut stone in our tender, would require advance of thirty-seven hundred and eighty dollars before we could sign contract. Writing full explanation.

BRANDON CONSTRUCTION CO.

The following letter was also written:—

Brandon, Man., May 29th, 1911.

W. P. Bate, Esq.,
Sect.-Treas. Saskatoon School Board,
Saskatoon.
Re Victoria School.

Dear Sir,—On our manager's return from Saskatoon we immediately checked up our estimate on the above building and found that we had omitted the cut stone work. We had a tender for three thousand seven hundred and eighty dollars which did not include the setting of about $750.00. We have wired you to-day that we would require the sum of $3,780.00 added to our tender before we could sign the contract. This would leave us without anything for setting but we would be willing to let this go if the other amount is added to our tender. We are very sorry that this should happen but it is the first time in our experience that we have made an error of this nature in our estimates.

We might mention that if we receive a favourable reply we will immediately ship our plant and send our superintendent to start operations.

Trusting that we will have an immediate reply,

Yours truly,

D.T.M.H. THE BRANDON CONSTRUCTION CO. LTD.
Managing Director.

This letter is signed in the same way as the tender and the letter accompanying it.

The following telegram was sent by Bate:—

May 31, 1911.

The Brandon Construction Co.,
Brandon.

Will you sign our Standard Contract Form as per our advertisement at your original tender forty-five thousand dollars wire reply immediately yes or no.

W. P. Bate.

The following reply was sent to that telegram:—

Brandon, May 31, 1911.

Sect.-Treas., Sask. School Bd.,
Saskatoon.

Will sign standard contract at forty-eight thousand seven hundred and eighty dollars.

Brandon Construction Co.

The next communication was the following telegram:—

Brandon, Man., June 2nd, 1911.

W. P. Bate, Sect.-Treas., Saskatoon School Board, Saskatoon.

Our Mr. Harrington will be in Saskatoon Saturday morning.

Brandon Construction Co.

The managing director went to Saskatoon as he stated he would in the last mentioned telegram and there stated that the plaintiff company would sign the contract at $48,780.00. The defendants would not accept that, and Harrington went back to Brandon and the negotiations terminated. It will be observed that throughout the whole of the negotiations and correspondence in the matter that everything that emanates from the plaintiffs, purports to come from them either strictly under their corporate name or under their corporate name by their managing director, and that right down to the very last Harrington assumes to act with authority. He never once intimated anything to the contrary, and his acts and conduct are of a character which one would imagine a managing director of such a company to exercise.

The *only ground* on which Harrington places the refusal of the plaintiffs to sign the contract was that he wanted the contract price increased to $48,780.00, and he states that if it was so increased the company would execute it. He raised no objection to the form of the contract, that is because it was the standard form, nor did he raise any objections to the payments as provided by the contract and specifications. Taking his conduct altogether, with the telegrams and letters, he must be held as accepting the defendants' proposition to adopt the standard form of contract and the method and time of payment provided in it and the specifications. Now, after all this, Harrington comes into Court and swears that he had no authority whatever in the transaction, or anything relating to it except to put in the tender. Whether he means that as a matter of fact or a matter of law is open to question. It may be that no formal

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meeting of the board of directors was called which authorized him to act and therefore he concludes that he had no authority to bind his company. As a matter of law I question the correctness of his conclusion. I am of opinion that an officer holding the position of managing director of a company like the plaintiffs' cannot hold himself out as he has done and his company not be bound by his acts. When I consider the number of trading companies for all sorts of trades that are everywhere springing into existence, to hold otherwise than as I have just held would disorganize all trade with them and prove disastrous to the companies themselves. For instance, suppose that a travelling salesman comes to an incorporated company carrying on the business of a general supply store, to whom would he go to solicit an order? I would say to the manager. Having received an order from him, must he be careful to see that the directors of the company have been called together to sanction the order and have the corporate seal affixed to it, and if he does not and the seal has not been affixed and the goods arrive as directed, can the company or its management if something arises which makes it undesirable on its part to receive the goods, turn around and arbitrarily decline to receive the goods, and set up that the manager had no authority to give the order because the corporate seal was not affixed thereto? If changes in the order appear to be desirable from time to time, and are assented to by the manager, have the directors to be called together at each step to authorize the affixing of the corporate seal? To hold this in respect to a trading corporation would render dealing with them so vexatious that it seems to me few persons would desire to have such dealings. I hold that the plaintiff company is bound by the acts and conduct of its managing director which I have heretofore referred to.

On June 3rd the defendants' secretary-treasurer sent the plaintiffs the following wire:—

Saskatoon, Sask., June 3rd, 1911.

Brandon Construction Company.
Brandon, Man.

Negotiations have ended by refusal of your Mr. Harrington to proceed with operations in accordance with tender we are therefore compelled to ask you to forfeit your cheque. W. P. RAYE.

The power of the defendants' company to act depends somewhat on different considerations from what I have applied to the plaintiffs' company. The defendants are not a trading corporation but they are bound by Legislative enactments to some extent. It is also set up that the acts of the defendant company must be signified step by step under their corporate seal. I do not assent to this proposition either; section 88 of the School Act, R.S.S. 1909, ch. 100, must be observed. That section is as follows:—

No act or proceeding of any Board shall be deemed valid or binding on any party which is not adopted at a regular or special meeting at which a quorum of the Board is present.

And by clause 2 of the section a majority of the board constitutes a quorum. Under this provision there is a clear inference that there may be acts or proceedings of a board which shall be deemed valid and binding if adopted at a regularly constituted meeting of such board although not under the corporate seal. The minute book of the meetings of the defendants' school board was produced at the trial and extracts therefrom bearing on the matters in question in this action were put in, by which it appears that resolutions were duly passed authorizing the architect to call for tenders, accepting the plaintiffs' tender practically as set forth in the telegram of Bate; setting forth that the special meeting of the 27th May, Harrington being present, was held (as testified to by Bate) and that Harrington took away the contract in triplicate to have it signed at Brandon; also setting out that the telegram from the plaintiffs of May 29th had been reported to the board and that thereupon the board resolved that a telegram be sent to the plaintiffs that as they had failed to sign the contract and the limit of time had expired their $2,000.00 cheque was forfeited.

Subsequently on June 1st a meeting of the board was held when it was resolved that the secretary defer all action respecting tenders until the board met again and instructed him. On the 5th June and after the interview between Sparling, one of the trustees, and Harrington, the board again met when Sparling reported the interview between himself and Harrington on the last occasion of Harrington being at Saskatoon in connection with the matter. This report was entered on the minutes and the resolutions of the board immediately following it are as follows:—

Mr. Sparling then reported that on Saturday last, Mr. J. W. Harrington of the Brandon Construction Co. had visited the city and had been interviewed by Mr. Sparling; that the question being put to him whether his company would proceed with their original tender of $45,000.00 would only reply, "we will proceed at a price of $48,780." The question being put several times with the same reply; that finally being asked, "Then the Board may imply from that that you will not proceed at $45,000?" he answered in the affirmative; that Mr. Sparling had then informed him that the matter was ended and in answer to his question had stated to Mr. Harrington that the Board would not return the deposit cheque.

Mr. Holmes moved that the Board endorse the action of the chairman of finance committee and also his action in wiring the firm the result of the interview and intention of the Board to forfeit the deposit cheque. Carried.

The wire referred to is no doubt Bate's telegram of 3rd June. It will be noticed therefore that the defendants pro-

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ceeded throughout the whole transaction in accordance with section 88 of the School Act referred to, and that all of Bate's telegrams were warranted or indorsed by such resolutions. I am of opinion that it was not necessary that these authorizations or resolutions should be made under the seal of the defendants; in any event apart from the inference which I state may be drawn from section 88. As before stated it is not sought to hold the company liable under a contract; the claim is that they are withholding money they should return. The defendant company's answer:—

> You are not entitled to have the money returned; you deposited it with us under certain conditions which enabled us to retain it if you did not perform them and you did not perform them and that being so, with a view to enabling us to retain the money, we have passed all the necessary resolutions and caused you to be served with all proper notices.

It was also urged that the plaintiffs have a right to recover herein because the defendants have failed to execute the contract on their part (of course under their seal). There is nothing whatever to this contention.

The action will be dismissed with costs.

Action dismissed.

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July 17.

BAXTER v. ROLLO.

British Columbia Supreme Court. Trial before Murphy, J. July 17, 1912.

1. EVIDENCE (§ VI J—571—PAROL EVIDENCE TO IDENTIFY PARCEL OF LAND AGREED TO BE SOLD—BOUNDARIES OF PARCEL POINTED OUT TO PURCHASER BY OWNER.

Where an agreement for the sale of land is evidenced by a receipt signed by the owner, which stated that he had received from the purchaser a certain sum of money "on acct. of purchase of 3 acres of land at" a certain price per acre on a specified body of water, such description is sufficient within the Statute of Frauds to permit the admission of parol evidence for the purpose of identifying the land which evidence is that the owner and the purchaser, before the agreement was made, went to the land and there found that three of the boundary lines were clearly visible to the eye because made by natural objects, and that the other was a line dividing the land from that of an adjoining owner which was pointed out to the purchaser by the owner.

[*Plant* v. *Bourne*, [1897] 2 Ch. 281, followed.]

2. CONTRACTS (§ I E—108)—STATUTE OF FRAUDS—SUFFICIENCY OF RECEIPT SIGNED BY OWNER OF LAND—CONCLUSIVENESS OF CONTRACT.

A concluded bargain is made for the sale of land when the owner signs a receipt that he had received a certain sum of money on account of the purchase thereof.

3. CONTRACTS (§ I C 2—25)—CONSIDERATION—INADEQUACY AS GROUND FOR REFUSING SPECIFIC PERFORMANCE.

Specific performance will not be refused on the sole ground of inadequacy of consideration unless the disparity in price is so great as to shock the conscience and constitute in itself a badge of fraud.

4. CONTRACTS (§ I A—2)—PARTIES—INADEQUACY OF CONSIDERATION—VENDOR OF LAND AN OLD MAN—ABSENCE OF INCAPACITY.

The mere fact that the owner of land who had sold it at an inadequate price was an old man nearly eighty years of age, does not make the contract of sale unenforceable where no suggestion of any other incapacity appears on the record.

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Statement

TRIAL of an action for specific performance of an agreement for the sale of land.

There was judgment for the plaintiff, the purchaser.

Darling, for the plaintiff.

W. J. Taylor, K.C., for the defendants.

Murphy, J.

MURPHY, J.:—The agreement evidenced by the receipt of the 3rd March, 1910*, was proved; but it was objected that the said receipt did not comply with the Statute of Frauds, the land not being specified therein. I think this is met by the case of *Plant* v. *Bourne*, [1897] 2 Ch. 281, which decides that parol evidence is admissible to shew what is the subject-matter of the contract. There is no difficulty here in identifying the land in question, if such parol evidence is admissible.

It is shewn that this land is a long dyke of gravel, bounded on one side by the sea, on the other by a lagoon, at one end by a high rock bluff, and at the other by the line dividing the land of the defendant Rollo senior from that of the Western Fuel Company. Before the agreement was made, the plaintiff and defendant Rollo senior went on the land, and this dividing line was pointed out by Rollo to the plaintiff. The other natural boundaries were clearly visible to the eye, and a rough calculation of the acreage embraced was then made. I hold, therefore, that this defence fails. This practically disposes of the case as raised on the pleadings as against Rollo senior.

The only other defence set up was, that no concluded bargain was made; and that, though the plaintiff was frequently requested to complete the negotiations, he neglected to do so. This was clearly disproved by the evidence. A concluded bargain was made on the day the receipt was signed. The next day, the plaintiff engaged a surveyor, who surveyed the land. Within a very short time, he offered the balance of the purchase-money to Rollo junior, pursuant to the agreement, as sworn to by him; and his evidence is wholly uncontradicted.

The plaintiff went on the land and carried on operations for a considerable time without interference. At the trial, however, it was argued that the bargain was so unfair that specific performance ought not to be granted.

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*The following is a copy of the receipt referred to:—

Mar. 3rd, 1910.

Received from Mr. A. Baxter twenty-two dollars ($22.00) on acct. of purchase of 3 acres of land at sixty dollars per acre, on Le Beouf's Bay.

JAMES ROLLO.

Witness, W. J. BROWN.

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Inasmuch as this defence is not raised on the pleadings, and no application to amend was made, I doubt that I should consider it. However, as some evidence was given without objection, tending to support it, possibly I should deal with it. The argument was, that only $180 was to be paid for land admittedly worth $6,000, and that the bargain was made with a man almost eighty years of age.

The authorities go to shew that specific performance will not be refused on the ground of inadequacy of consideration unless the disparity in price is so great as to shock the conscience and constitute in itself a badge of fraud. Stated baldly, as was done in argument, the bargain here does almost, if not quite, go that length. Examination of the evidence, however, shews that the statement that the dyke contained 60,000 yards of gravel worth ten cents a yard in situ was only an estimate.

True, the plaintiff so estimated it at the time of making the bargain; but, as he states in evidence, there could be no certainty about this, as no one could tell whether the dyke was all gravel or not. He further stated that he would not have purchased on the basis of the estimate at the price of ten cents per yard. According to the corroborated and uncontradicted evidence, Rollo senior himself set the price at $60 per acre, which, after some bargaining, the plaintiff agreed to. The only other offers were one for $100 per acre, which, it is true, was made some years ago and was refused, and the agreement with the defendant Bradford by which he pays ten cents a yard for such gravel as he may remove. It is to be noted, however, that he is not compelled to take any specific quantity, and has in fact removed but little up to date. On the whole, I think, under the law as it now stands, this evidence of disparity in price alone will not justify refusal of the decree.

Does the added fact that Rollo was an old man make the contract unenforceable? If the evidence went the suggested length of shewing him incapable of transacting business, or that he was under the influence of liquor when the bargain was made, I would agree; but I do not think I can so hold on the record. The son, it is true, does suggest that both these conditions existed; but his evidence in no way proves anything as to liquor, as he was not present when the bargain was made, and only saw his father later in the day.

As to his father's incapacity, this evidence must, I think, be closely scrutinized, inasmuch as, if the agreement sued upon is invalid, it is the son, and not the father, who will benefit, as the land has since been conveyed to him. The father was present in Court, but was not called as a witness. This, coupled with the fact that no suggestion of such incapacity appears anywhere on the record, compels me to hold that the onus of establishing the fact has not been satisfied.

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Murphy, J.

The bargain is undoubtedly a hard one; but I am reluctantly compelled to hold that the law, as I conceive it to be, gives the plaintiff the right to obtain specific performance. As to the two other defendants, they acquired their rights with full knowledge of the plaintiff's claim, and, indeed, subject to such claim, if it turned out that it was enforceable at law. If, therefore, the decree must go as against Rollo senior, it must also go as against them.

Specific performance of the agreement is granted, and there will be a reference to the registrar as to the damages suffered by the plaintiff by reason of the removal of gravel by the defendant Bradford, if the parties cannot agree on the quantity. Such gravel is to be paid for at the rate of ten cents per yard.

Judgment for plaintiff.

SCOTT v. ALLEN.

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June 22.

Ontario Divisional Court, Falconbridge, C.J.K.B., Britton and Riddell, JJ. June 22, 1912.

1. HUSBAND AND WIFE (§ I A 2—18)—HUSBAND'S LIABILITY FOR WIFE'S ACTS AS AGENT—REBUTTABLE PRESUMPTION.

It is a presumption of law that a wife living with her husband has his implied authority to pledge his credit for such things as fall within the domestic department ordinarily confided to her management and as are necessary to the style in which her husband chooses to live, though the presumption may be rebutted by shewing that she had no such authority.

[Eversley on Domestic Relations, 3rd ed., pp. 312, 313, specially referred to. See also *Jolly* v. *Rees*, 15 C.B.N.S. 628, 33 L.J.C.P. 177; *Debenham* v. *Mellon*, 5 Q.B.D. 394, affirmed 6 A.C. 24.]

2. EVIDENCE (§ XII F—954*a*)—SUFFICIENCY OF EVIDENCE SHEWING THAT WIFE'S IMPLIED AUTHORITY TO PURCHASE ON HUSBAND'S CREDIT WAS REBUTTED—ABSENCE OF CORROBORATION.

In an action at the suit of the executrix of a grocer's estate for the balance on account of groceries furnished by the decedent to the defendant's wife a corroboration of the alleged instruction by the defendant to his wife testified to by him not to run a bill, must be furnished to overcome the presumption that she had his implied authority to purchase on credit necessaries suitable to his degree and estate.

3. LIMITATION OF ACTIONS (§ IV C—166)—INTERRUPTION OF LIMITATION BY PAYMENT.

The Statute of Limitations is not a bar to an action for the balance due on a grocer's account incurred by the wife of the defendant where it appeared that, during the lifetime of the grocer it was the practice of the defendant's wife to buy groceries and make monthly payments therefor, generally precisely the amount of the month's purchases, but sometimes a little more or a little less, so that at the death of the grocer there was a balance left unpaid, a statement of which was sent by the executrix of his estate to the wife of the defendant who promised to pay the bill, and payments were made by her from time to time until her death and then were continued by her daughter until the defendant put a stop to it, and, therefore, the executrix is not debarred from recovering the balance remaining unpaid from the defendant.

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SCOTT v. ALLEN.

APPEAL by the defendant from the judgment of the County Court of the United Counties of Leeds and Grenville, in favour of the plaintiff, in an action tried without a jury. The plaintiff sued, as executrix of R. A. Scott, deceased, for the balance of an account for goods alleged to have been supplied to the defendant, upon the order of his wife, by the deceased Scott.

The appeal was dismissed.

Argument

I. Hilliard, for the defendant. The defendant's wife, now deceased, had no authority from the defendant to order the goods. In fact, the evidence shews that the defendant had expressly ordered her not to go in debt, and that Scott had notice that the defendant's wife had no right to pledge her husband's credit. Scott should have notified the husband: *Jolly* v. *Rees* (1864), 15 C.B.N.S. 628; *Debenham* v. *Mellon* (1880), 6 App. Cas. 24. The husband had supplied his wife with other means of payment: *Morel Brothers & Co. Limited* v. *Earl of Westmoreland*, [1903] 1 K.B. 64, [1904] A.C. 11; *Atkyns* v. *Pearce* (1857), 26 L.J.C.P. 252. The Statute of Limitations applies, inasmuch as there was no evidence to shew that the account as kept in the testator's books was ever brought to the attention or knowledge of the defendant or his wife, and that all payments from 1900 down were payments upon the monthly statements only. Part payment must be applied to the particular part.

[The Chief Justice said that the members of the Court were agreed on the main question. The law was correctly laid down in Eversley on Domestic Relations, 3rd ed., pp. 312 and 313. They would hear counsel for the plaintiff on the question of the Statute of Limitations.]

J. A. Hutcheson, K.C., for the plaintiff. The evidence shews that the account was fluctuating all the time, that many payments were appropriated on the old account. When there is no evidence of appropriation, the presumption is, that the payments were appropriated to the old account. At any rate, there was an account rendered in 1907, and payments made on account of it. The pass-book, which is in as an exhibit, shews this.

Hilliard, in reply. The evidence of the books, which were not rendered to Mrs. Allen, is not evidence against the defendant.

Riddell, J.

June 22, 1912. RIDDELL, J.:—The plaintiff is the executrix of the late R. A. Scott, who in his lifetime carried on business as a grocer; and she sues the defendant for the balance of an account for goods supplied by her testator. The defendant defends mainly on two grounds, viz.: (1) want of authority in his wife (now deceased) to order the goods; and (2) the statute.

We disposed of the first at the hearing of the appeal, holding that the law is correctly laid down in Eversley on Domestic Relations, 3rd ed., pp. 312, 313: "During cohabitation, there

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is a presumption arising from the very circumstances of the cohabitation of the husband's assent to contracts made by the wife for necessaries suitable to his degree and estate; that is to say, a wife has an implied authority to pledge her husband's credit for such things as fall within the domestic department ordinarily confided to her management, and are necessary and suitable to the style in which her husband chooses to live. . . . In other words, where a wife is living with her husband, the presumption is that she has his authority to bind him by her contracts for articles suitable to that station which he permits her to assume, but that presumption may be rebutted by shewing that she had not such authority. This doctrine was laid down in the two important cases of *Jolly* v. *Rees*, 15 C.B.N.S. 628, 33 L.J.C.P. 177, and *Debenham* v. *Mellon*, 5 Q.B.D. 394, 6 A.C. 24, and is now settled law."

There was no doubt that the goods supplied were necessaries suitable to the station of the defendant and the style in which he lived.

We also held that, in this action at the suit of an executrix, corroboration of the alleged instruction to the defendant's wife not to run a bill must be adduced—and that no such corroboration was furnished.

Speaking for myself, I would say that the alleged limitation of authority was by no means made out, even if the defendant's evidence should have full credence and effect—all that took place was a warning not to get into debt, not an unprecedented occurrence. It has been held that grumbling and remonstrance at a wife's extravagance is not a limitation of authority: *Morgan* v. *Chetwynd* (1865), 4 F. & F. 451, 457.

We reserved judgment to look into the question of the application of the statute.

On this branch of the case, also, I think the defendant fails. The present account began as far back as the 23rd February, 1882, at which time the parties had a settlement, and the account was paid in full. During the lifetime of Scott, the practice was for the wife of the defendant to buy groceries and make monthly payments, generally precisely the amount of the month's purchases—but sometimes a little more or a little less; if less, the running balance—for it was all one running account—was increased; if more, diminished. But, after the death of Scott, in June, 1907, and in August, 1907, the account was sent to her in full, *i.e.*, a statement of the whole balance. Mrs. Scott, the plaintiff, was under the impression that this was done in June, 1907; but it is clear that she has made a mistake in the date—and, indeed, she acknowledges it on cross-examination. That the account was sent is abundantly proved, not only by the plaintiff, but also by the bookkeeper, by Mrs. Birks and by the daughter of the defendant. (It is indeed actually produced at

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the trial by the defendant (exhibit 8); see also exhibit 4). This witness says that her mother received the account, that it came as a great shock and surprise to her—"this large account, she did not know where it ever arose from."

Mrs. Allen then went to the plaintiff and asked her not to crowd them for the account—that she would pay it all. This is established by the evidence of the plaintiff and of Mrs. Birks—and the promise seems to have been repeated at different times.

Payments were made from time to time by Mrs. Allen upon this account; the plaintiff ceased to keep a shop, and the payments were not in whole or in part on goods bought at or about the time. Even after the death in 1909, her daughter, who then was put in charge of the defendant's household affairs, made a few payments, and doubtless would have continued doing so had not the defendant put a stop to it.

I have not thought it necessary to go through the account from the beginning: we were told by counsel for the plaintiff that the whole account from beginning to end was kept alive by payments, and that there never was a time when any part of it—or any item of it—was barred by the statute. While this was denied by counsel for the defendant, we were not pointed to any period as supporting his contention; and the course of dealing, in the periods I have examined, make it most probable that the plaintiff is right. Since *Boultbee* v. *Burke* (1885), 9 O.R. 80, it cannot be successfully argued that the payment of a part is not an act from which the inference may be drawn that the debtor intended to pay the balance, though no special reference is made thereto at the time of such part payment: or that a payment on account of a debt is not such part payment: *Ball* v. *Parker* (1876), 39 U.C.R. 488, and cases cited there and in 9 O.R. 80. Here the case is stronger—the debt was known and acknowledged; time was asked and accorded; and the payments were, at least in some instances, made specifically and explicitly with reference to it—and there was no other debt.

The appeal should be dismissed with costs.

Falconbridge, C.J.

FALCONBRIDGE, C.J.:—I agree.

Britton, J.

BRITTON, J.:—There is evidence to warrant fully the findings of fact of the learned County Court Judge; and upon the hearing of this appeal we were satisfied of the original liability of the defendant for the purchases by his wife—now deceased—but decision was reserved upon the question of whether the plaintiff's claim is barred by the Statute of Limitations. I am of opinion that the payments from time to time by the wife of the defendant were upon the whole running account so as to keep the claim alive. When the wife overpaid the current account for purchases during the month, she intended such overpayment to apply generally on the indebtedness. Even if she made no

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specific application of such sum as overpaid the month's purchases, the creditor, Scott, could apply it generally, so long as the account upon which the payment was applied was not statute-barred. There was—and in time—such application of the payments. It is rather hard that now, after the death of his wife and after the death of the creditor, Scott, the defendant should be called upon to pay this large account—when at least $100 of it was owed as long ago as the 20th December, 1901; but such is the law, and the defendant must submit. As the wife, living with her husband, had the right to pledge her husband's credit for necessaries, then she had the right to make payments from time to time, so as to prevent the claim being barred by the Statute of Limitations—and the defendant is bound by what his wife did, in acknowledging the correctness of the account as finally rendered, and by the payments thereon subsequently made by her.

Appeal dismissed with costs.

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Re DARRACQ (alias DUTAL).

Quebec Court of King's Bench, Gervais, J. August 20, 1912.

1. HABEAS CORPUS (§ I C—18)—EXTRADITION PROCEEDINGS—REVIEW OF REMAND BY COMMISSIONER—STATUTORY REQUIREMENTS.

On an application for a writ of habeas corpus for the discharge from custody of a person who was remanded by an extradition commissioner for extradition to France, the only question for examination is whether the extradition proceedings are in strict conformity with the requirements of the treaty of August 14th, 1876, between England and France, of the Imperial Extradition Act 1870, and of the Canadian Extradition Act R.S.C. 1906, ch. 155.

2. EXTRADITION (§ I—8)—INTERNATIONAL—REVIEW OF PROCEEDINGS—DECISION OF COMMISSIONER—EVIDENCE AS TO IDENTITY OF PRISONER.

On an application for a writ of habeas corpus for discharge from custody of a person remanded by an extradition commissioner for extradition to a foreign country the decision of the commissioner as to the sufficiency of the evidence, where there is any evidence at all, as to the identity of the party remanded by him, cannot be reviewed.

3. HABEAS CORPUS (§ I C—18)—EXTRADITION PROCEEDINGS—REVIEW OF FINDING OF COMMISSIONER AS TO PROPRIETY OF ORDER.

On an application for a writ of habeas corpus for the discharge from custody of a prisoner remanded by an extradition commissioner for extradition to a foreign country the justice or the propriety of the order of the commissioner in that regard cannot be inquired into.

[*United States of America* v. *Gaynor and Green*, 9 Can. Crim. Cas. 205, *United States* v. *Gaynor*, [1905] A.C. 128, followed.]

Statement

AN extradition proceeding against Pierre Jean Darracq, alias Marcel Dutal, at the instance of the Republic of France, petitioner in extradition. The defendant having been committed for extradition to France on charges of house breaking and attempted murder, made the present application by way of petition for a writ of *habeas corpus* for his release from custody and to review the regularity of his commitment.

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The defendant's petition was dismissed.

J. A. St. Julien, K.C., for the petitioner.
Gonsalves Desaulniers, K.C., for the Republic of France.
D. A. Lafortune, for the Crown.

GERVAIS, J.:—The petitioner has been committed to jail awaiting a warrant of extradition, by remand of the Honourable F. X. Choquet, as a commissioner in extradition, dated July 31, 1912, for house-breaking and attempted murder, on or about the 20th November, 1911, at Begles and Bordeaux, France.

The extradition of the accused is sought under the treaty of the 14th August, 1876, between England and France. Amongst other things that treaty enacts, in the first place, that natural born or naturalized subjects are exempted from the scope of the treaty; in the second place, a long series of crimes and offences are declared to give rise to extradition, amongst them those of attempted murder and burglary.

With regard to the proof which is declared to be necessary to obtain an extradition under the treaty, paragraph "A" of art. 7, enacts as follows:—

> In the case of a person accused, the requisition for the surrender shall be made to Her Brittanic Majesty's principal Secretary of State for Foreign Affairs, by the ambassador or other diplomatic agent of the President of the French Republic, accompanied by a warrant of arrest, or other equivalent judicial document issued by a Judge or magistrate duly authorized to take cognizance of the acts charged against the accused in France, together with a duly authenticated deposition or statement, taken on oath before such Judge or magistrate, clearly setting forth the said acts, and containing a description of the person claimed, and any particulars which may serve to identify him.
>
> The said Secretary of State shall transmit such documents to Her Brittanic Majesty's principal Secretary of State for the Home Government, who shall then give order, under his hand and seal, to some police magistrate in London, that such requisition has been made, and require him, if there be due cause, to issue his warrant for the apprehension of the fugitive.
>
> On the receipt of such order from the Secretary of State, and on the production of such evidence as would in the opinion of the magistrate justify the issuing of the warrant if the crime has been committed in the United Kingdom, he shall issue his warrant accordingly.
>
> When the fugitive shall have been apprehended he shall be brought before the police magistrate who issued the warrant, or some other police magistrate in London.
>
> If the evidence to be then produced shall be such as to justify according to the law of England the committal for trial of the prisoner, if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison to await the

warrant of the Secretary of State for his surrender, sending immediately to the Secretary of State a certificate of the committal, and a report upon the case.

After the expiration of a period for the committal of the prisoner, which shall never be less than 15 days, the Secretary of State shall by order under his hand and seal order the fugitive criminal to be surrendered to such person as may be duly authorized to receive him on the part of the President of the French Republic.

Paragraph "D" of the same article reads as follows:—

After the police magistrate shall have committed the accused or convicted person to prison to await the order of the Secretary of State for his surrender, such person shall have the right to apply for a writ of *habeas corpus*, and if he should so apply his surrender must be deferred until after the decision of the Court upon the return of the writ; and even that can only take place when the decision is adverse to the applicant. In the latter case the Court may at once order his delivery to the person authorized to receive him without the order of the Secretary of State for his surrender, or commit him to prison to await such order.

Article 10 says:—

When the fugitive criminal has been committed to prison, but not surrendered within two months of such committal, or within two months after the decision of the Court upon the return of a writ of *habeas corpus*, he shall be discharged from custody, unless sufficient cause be shewn to the contrary.

Finally, art. 16 of the treaty regulates extradition from a colony like Canada.

In the colonies and foreign possessions of the two high contracting parties, the manner of proceeding shall be as follows:—a requisition for the surrender of the fugitive criminal who has taken refuge in a colony or foreign possession of either party, shall be made to the Governor or chief authority of such colony or possession by the chief consular officer of the other in such colony or possession; or, if the fugitive has escaped from a colony or foreign possession of the party on whose behalf the requisition is made, by the Governor or chief authority of such colony or possession. Such requisitions may be disposed of, subject always as nearly as may be, to the provisions of this treaty by the respective Governors or chief authorities, who, however, shall have the liberty either to grant the surrender or refer the matter to their Government.

The definition of crimes for which extradition may be granted at the request of France, as well as the procedure according to which such extradition may be granted, are clearly determined, and must guide the Court absolutely.

With regard to the complaint made in France, the issue of the warrants therein, and the evidence of the crimes charged in France, these are complete, as far as the Court can see; and the documents containing the same have been properly authenticated according to the terms of the treaty and the international law relating to the matter.

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There remains to be dealt with only the arrest of the defendant made in Canada, in the district of Montreal, and within the jurisdiction of the Commissioner in Extradition, Honourable F. X. Choquet.

The photographs of the accused taken both in France and in Montreal are of record. The Chancellor of the French Consulate was heard before the Extradition Commissioner, and swore practically to the identity of the petitioner with the accused as named and charged in France. Moreover, the petitioner has seen fit to offer his testimony in denial of the evidence, both documentary and oral, brought against him before the Extradition Commissioner. His evidence does not seem to be of much benefit to him.

After argument by Mr. J. A. St. Julien, K.C., for the accused, and Mr. Gonsalves Desaulniers, K.C., on behalf of the French Republic, the Extradition Commissioner, on the 31st day of July, 1912, granted his warrant of remand, to await the execution of the warrant of extradition under the hand and seal of the Governor-General of Canada, after due notification in the meantime by the Extradition Commissioner to the accused that he had a delay of fifteen days to ask for the issue of a writ of *habeas corpus*. This writ was issued by us on the 13th of August, 1912, ordering Mr. Charles A. Vallee, in his capacity of jailer of the common jail for the district of Montreal, to bring before us the body of the petitioner.

We have examined the whole record of the proceedings before the Extradition Commissioner. We have also examined the affidavits and the petition upon the said writ. The only ground alleged for the maintenance of the same is the insufficiency of the evidence adduced before the Extradition Commissioner by the French Government with regard to the identity of the petitioner with the accused by the Criminal Court of Bordeaux.

The only ground we have to examine, therefore, is, can the warrant of remand be set aside on the present application for the reason that the Extradition Commissioner has wrongly appreciated the weight of evidence with regard to the identity of the petitioner?

The only question to be examined in the present case is whether or not under a writ of *habeas corpus* the evidence of the facts for the granting of a warrant of remand by the Extradition Commissioner can be reviewed, or appealed from.

The articles of the Extradition Treaty above quoted clearly shew that the evidence for the granting of such warrant must be "such as to justify according to the law of England the committal for trial of the prisoner, if the crime of which he is accused had been committed in England;"—"in such case," says

the treaty, "the police magistrate shall commit him to prison, to await the warrant of the Secretary of State for his surrender."

The Extradition Commissioner after examining the accused, hearing his evidence, seeing his photographs taken in France, and listening to the evidence of the Chancellor of the French Consulate, has thought fit to commit the accused to await the warrant of the Governor-General for his surrender. Can we, under the circumstances, say that the weight of evidence is in favour of the petitioner rather than in favour of the French Government? We consider this is a matter of fact, upon which no decision can be passed under a writ of *habeas corpus*, such as the one sought for. The justice of the decision of the Extradition Commisioner cannot be examined and passed upon under a writ of *habeas corpus*, but purely and simply the question of its legality—that is, its strict compliance with the requisites of the Extradition Treaty, as well as the general English Extradition Act of 1870 and the Canadian Extradition Act, which is to be found in chapter 155 of the Revised Statutes of Canada of 1906.

En passant, it may be said that our Canadian Extradition Act is framed upon the English Act above quoted, and cannot contradict the same, as the former cannot be itself in contradiction with the treaty, which must be supreme, both with regard to the right of extradition and the procedure thereon. The General Extradition Act of 1870, as a matter of fact, embodies the principles of three of the most important Extradition Treaties of England—that with Denmark, of 1842; France, of 1843; and the United States, of 1862—as for the good reason that the British Parliament thought fit to pass a General Act to put into execution its Extradition Treaties, which were becoming more and more numerous, and to avoid the trouble of passing a special Act for the putting into execution of each of its Extradition Treaties.

The principle which we accept, and which goes to say that under a writ of *habeas corpus* the justice or the propriety of the extradition cannot be enquired into, but merely its lawfulness or legality, has been sustained by the Privy Council, in the now important case of the *United States of America* v. *Gaynor and Greene*, 9 Can. Cr. Cas. 205, [1905] A.C. 128, and it is also the doctrine taught by the most important authors on Extradition, as Sir Edward Carson, Moore, and Piggott.

To sum up, we find that the formalities established by the Extradition Treaty of the 14th August, 1876, between France and England have been complied with in the present case; that the petitioner has had a legal preliminary investigation, and that his committal to await the warrant of surrender under the hand and seal of the Governor-General has been properly issued.

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This is not a case in which the evidence as to identity is lacking to such an extent as to bring a Court to the conclusion that there is no evidence to commit for trial, in violation of the treaty; and that therefore, the formality of producing such proof has not been complied with.

It is without our province to say whether or not the Extradition Commissioner has rightly or wrongly appreciated the weight of the evidence with regard to the identity of the petitioner, although, should we have to pass upon it, we would be inclined to say that his decision is correct.

We, therefore, dismiss the petition, and quash the *habeas corpus*. Here closes the judicial action, under the treaty; and here begins the diplomatic one.

Discharge refused.

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VAN WART (executors of J. W. Belyea Estate) et al. v. THE SYNOD OF FREDERICTON et al.

New Brunswick Supreme Court, Chancery Division. Hearing before McLeod, J. February 1, 1912.

1. GIFT (§ I—7)—BANK DEPOSIT PLACED IN JOINT NAMES OF HUSBAND AND WIFE FOR CONVENIENCE—EFFECT OF DEATH OF HUSBAND—INTENTION.

Where a deposit in the bank, upon the refusal of the bank to permit the wife of the depositor to withdraw the interest earned thereon when the husband was by illness prevented from going himself to the bank, was, at the suggestion of the bank officers and with the consent of the depositor, placed in the joint names of the depositor and his wife as a matter of convenience in withdrawing money for household expenses, the wife upon the death of the husband who had made a testamentary disposition of all his property did not become vested with the title to such deposit.

[*Marshall* v. *Crutwell*, L.R. 20 Eq. 328, and *Re Daly*, 37 N.B.R. 483, *Daly* v. *Brown*, 39 Can. S.C.R. 122, followed.]

2. HUSBAND AND WIFE (§ II A—52)—TRANSACTIONS BETWEEN—JOINT BANK ACCOUNT FOR CONVENIENCE ONLY—RIGHT OF WIFE ON DEATH OF HUSBAND.

Where a deposit in a bank, upon the refusal of the bank to pay the wife of the depositor the interest earned thereon when the husband was prevented by illness from going himself to the bank, was at the suggestion of the bank officers and with the consent of the husband, placed in the joint names of himself and wife to be withdrawable by either of them or the survivor of them, as a matter of convenience for obtaining money for household expenses, the wife upon the death of the husband who made a testamentary disposition of all his property did not become vested with the title to such deposit.

3. WILLS (§ III B—80)—BEQUEST TO INCORPORATED RELIGIOUS BODY—IDENTITY OF DEVISEE.

A bequest to an incorporated religious body is not void for uncertainty as to the devisee or legatee, if the persons intended to be benefited can be ascertained with reasonable certainty.

[*Adams* v. *Jones*, 9 Hare 485, and *Jones* v. *St. Stephen's Church*, 4 N.B. Eq. 316, followed. See also *Re Swayzie*, 3 D.L.R. 631.]

4. WILLS (§ III B—91)—GIFT TO "EPISCOPAL DENOMINATION"—WHO MAY TAKE.

A bequest to the "Episcopal Denomination of Queen's County" is a good gift to the Diocesan Synod of Fredericton of the Church of England, where the term "Episcopal Denomination" is commonly applied to designate the Church of England.

5. WILLS (§ III B—91)—GIFT TO "METHODIST DENOMINATION"—WHO MAY TAKE.

A bequest to the "Methodist Denomination of Queen's County" is a good gift to the Methodist Church incorporated by the Canadian Parliament.

6. WILLS (§ III B—91)—GIFT TO "FREE BAPTIST GENERAL CONFERENCE OF NEW BRUNSWICK"—WHO MAY TAKE.

A bequest to the "Free Baptist General Conference of New Brunswick" for the use of home and foreign missions of Queen's County, is not rendered void by the fact that there were many churches of that name in the county, since, by 6 Edw. VII. 1906, ch. 77, such churches were united as "The United Baptist Church of New Brunswick" in which was vested the property of the several churches, as well as all bequests of money or land made before or after the passing of such Act, and which carried on the missionary work of the church in such county.

7. WILLS (§ III B—91)—GIFT TO "DEAF AND DUMB SOCIETY OF NEW BRUNSWICK"—WHO MAY TAKE.

Where there was no deaf and dumb society in New Brunswick when a will was executed and, at the death of the testator, the only organization of the kind in that province was one incorporated as the New Brunswick School for the Deaf, such school was entitled to a legacy in the will to the "Deaf and Dumb Society of New Brunswick."

ACTION for the construction of a will.

Statement

Argument

G. H. V. Belyea, for the plaintiff:—The executors are prepared to administer the fund if it is decided it is their duty to do so. It is a matter of indifference to them as to the decision of the Court.

M. G. Teed, K.C., and *J. R. Campbell*, for the Diocesan Synod of Fredericton:—The moneys that were in the banks were the property of the testator. *In re Estate of Paul Daly*, 37 N.B.R. 483, affirmed, *Daly* v. *Brown*, 39 Can. S.C.R. 122, is the principal case on this point. The money in that case was simply deposited to the credit of two persons, with power to either to withdraw. In this case there was a like deposit in the Government Savings Bank. But the deposits in the Bank of Montreal and in the Bank of New Brunswick contained additional words making them payable to the survivor. The latter bank exceeded its instructions in adding the word "survivor." (THE COURT:—If he had the deposit receipt and knew of it, and did not change it, that would be to the effect he consented to it). He had it in his possession, but that would not be evidence he saw it. As regards the money in the Government Savings Bank, the evidence shews only a power to draw, and as regards the money in the other banks the circumstances and the purpose for which it was given rebut the presumption of a gift. The fact that the bank in carrying out the instructions put in the word "survivor" does not vest it in her, because it is always a question of inten-

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tion, having regard to the surrounding circumstances and the object which is sought to be obtained. If she had withdrawn all in his lifetime, which she had the power to do, she would have held the money as his agent or trustee. The will made no change except that it operated in law as a cancellation of the authority to withdraw. If you give any meaning to the word "survivor" it must be a testamentary disposition which is void under the Wills Act. It was incomplete and not a gift *inter vivos*, and it was not a *donatio mortis causa*. It was simply a power of attorney. The money when drawn was not hers and he could at any time have cancelled the authority to draw. Thus tested, the question in law resolves itself down to a mere relation of agency between the parties. There was no contract between her and the banks; the testator simply gave her authority to draw, and added her name to effect that purpose; it was not as if testator had made the original deposit to the joint credit of himself and another. Construing the will as made immediately before death, we find a testator making bequests which probably exceeds his whole estate which consists solely of the money in the banks, which is cogent evidence to shew he never considered that he had given his money to his wife. The popular name by which the Church of England is known in these parts is Episcopalian. The Century dictionary defines Episcopal as "The name popularly given to the Episcopal Church in the United States and other places." It is not necessary that there should be a donee in the will: *Jones, Exr. Murdock* v. *St. Stephen's Church*, 4 N.B. Eq. 316. A charitable gift never fails for uncertainty: *Mills* v. *Farmer*, 1 Mer. 55. This bequest to the Diocesan Synod, a religious institution, was a charitable gift: *In re White, White* v. *White*, [1893] 2 Ch. 41, is the leading case. Lindley, L.J., there pointed out that although a religious society was not necessarily a charitable one as exemplified by *Cocks* v. *Manners*, L.R. 12 Eq. 574, yet a bequest to a religious institution, or for a religious purpose, is *primâ facie* a bequest for a "charitable" purpose. The bequest in *Re White, White* v. *White*, [1893] 2 Ch. 41, was "to the following religious societies, viz." but no societies were named, yet Lindley, L.J., would not allow the gift to fail. Therefore, the reference by the testator to the Church of England being mere error the Court of Chancery will not allow the case to fail. See the cases referred to by Lindley, L.J.: *Baker* v. *Sutton*, 1 Keen. 224; *Townsend* v. *Carus*, 3 Hare 257, and *Wilkinson* v. *Lindgren*, L.R. 5 Ch. 570. The case of *Grimond* v. *Grimond*, [1905] A.C. 124, is the only case of any consequence that can be cited *contra*, but in that case the bequest was indefinite and there are no reasons given in the judgment. It is pointed out in *Arnott* v. *Arnott*, [1906] 1 Ir.R. 127, that *Grimond* v. *Grimond*, [1905]

A.C. 124, is a decision upon Scotch law, and does not affect the rule laid down in *Re White, White* v. *White*, [1893] 2 Ch. 41. See also *Attorney-General* v. *Stepney*, 10 Ves. 22; *In re Lea*, 34 Ch.D. 528; *In re Scowcraft*, [1898] 2 Ch. 638; *In re Delmar, a charitable Trust*, [1897] 2 Ch. 163; *In re Pardoe*, [1906] 2 Ch. 184.

A. A. Wilson, K.C., for the association of the United Baptist Churches of New Brunswick, The Foreign Mission Board of the Baptist Convention of the Maritime Provinces, and the New Brunswick School for the Deaf:—There is nothing uncertain in regard to the bequest to the Free Baptist Conference. The omission of the word "Christian" does not make it uncertain, there being no other corporation or body like it in the province. The Free Christian Baptist Conference has been merged in the Foreign Mission Board which is carrying on a charitable work and this bequest should go to that body. The legacy did not lapse: *Jones, Exr. of Murdock Estate* v. *St. Stephen's Church*, 4 N.B. Eq. 316. The money in the banks did not vest in Mrs. Belyea.

E. T. C. Knowles, for the Methodist Church:—The authority to withdraw was given as a matter of convenience. There was no gift: *In re Paul Daly*, 37 N.B.R. 483. The bequest after the life estate to Sophia Belyea differs from the others in that it is for the use of the home and foreign missions in Queen's County, and the scheme for working that out would be for the Court. The word "denomination" is practically applied to the word "church" as a description. See its definition in Century dictionary. Payment therefore, should be made to the Methodist Church through its general missionary board. As to what are charitable bodies, see *Morice* v. *The Bishop of Durham*, 9 Ves. 399, 10 Ves. 522. The bequest being for the advancement of religion is a charitable bequest and cannot be allowed to fail: *In re White, White* v. *White*, [1893] 2 Ch. 41. See also *Ray* v. *The Annual Conference of New Brunswick*, 6 Can. S.C.R. 308.

J. A. Belyea, K.C., for Margaret E. Belyea, Sophia A. Belyea and Edna Belyea:—

The money vested in Mrs. Belyea: Am. & Eng. Encyc. of Law, 2nd ed., vol 27, page 555; *In re Ryan*, 32 O.R. 224; *Low* v. *Carter*, 1 Beav. 426; *Dummer* v. *Pitcher*, 2 My. & K. 262; *In re Eykyn*, 6 Ch.D. 115; *In re Young Tyre* v. *Sullivan*, 28 Ch.D. 705; *In re Paul Daly*, 37 N.B.R. 483. The latter case is distinguished from the present. In every case it is a question of intention to be gathered from the special facts and circumstances of the family relations or otherwise of the parties. See remarks of Barker, C.J., in *Clarke* v. *Clarke*, 4 N.B. Eq. p. 237; *Re the Paul Daly Case*, 37 N.B.R. 483. There is no evidence to shew any intention on his part not to give her the money. On

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the other hand she had absolute authority to withdraw, and there is the positive direction to give it to her as survivor. If the Bank of New Brunswick exceeded its instructions in adding the words "or survivor," his keeping the deposit receipt shewed it was his intention to have it remain in that form. The addition of her name was not made on account of his illness, but to provide for her, for whom he had sworn to provide. See *O'Brien* v. *O'Brien*, 4 O.R. 450. Assuming the money did not vest in her, the legacies are not for charitable purposes, they are void for uncertainty, and have lapsed: Theobald on Wills, 7 Can. ed., 356, 372; *In re Ovey, Broadbent* v. *Barrow*, 29 Ch.D. 560; *Brewster* v. *The Foreign Mission Board of the Baptist Convention of the Maritime Provinces*, 2 N.B. Eq. 172; *New* v. *Bonaker*, L.R. 4 Eq. 655.

Teed, K.C., in reply:—The cases cited to shew a gift to the wife are all cases where there was no evidence of an intention to the contrary. But in the *Daly* case, as in this case there was evidence to repudiate the presumption of a gift, and it is to such evidence that Barker, C.J., referred in *Clarke* v. *Clarke*, 4 N.B. Eq. 237. Religious purposes are not necessarily charitable purposes, but missions are charitable because they go to support people carrying on a charitable work.

McLeod, J.

McLEOD, J.:—The testator James W. Belyea, in his lifetime lived in the parish of Wickham, Queens County, and died on the 26th January, 1911, having made a will bearing date the 17th of April, 1902, and by it appointed the plaintiffs his executors. The bequests in the will that are in question are as follows:—

> I give and bequeath to the Episcopal Denomination of Queens County, one thousand dollars to be used by them for Home and Foreign Missions, as seems best to them. I give and bequeath to the Methodist Denomination of Queens County, one thousand dollars to be used by them for Home and Foreign Missions as seems best to them. I give and bequeath to the Free Baptist General Conference of New Brunswick one thousand dollars, to be used by them for Home and Foreign Missions in Queens County as seems best to them. I give to my daughter Sophia A. Belyea the interest of one thousand dollars to use for her benefit during her natural life and at her demise the aforesaid one thousand dollars to be equally divided between the aforementioned denominations, viz., Episcopal, Methodist and Free Baptist, to be used for Home and Foreign Missions in Queens County as may seem best to them.
>
> I give to my beloved wife Margaret E. Belyea the benefit of twelve hundred dollars at four per centum per annum during her natural life and at her decease or demise to be equally divided between the three aforementiond denominations, viz.: Episcopal of Queens County, Methodist of Queens County and the Free Baptist General Conference of New Brunswick to be used in Queen's County to be used for Home and Foreign Missions as may seem best for them so to do.

I give to the Deaf and Dumb Society of New Brunswick, two hundred dollars.

The defendant Margaret E. Belyea is the widow of James W. Belyea and Sophia A. Belyea is the daughter of the said James W. Belyea by a former wife. Edna Belyea (who is an infant and appeared by a guardian *ad litem*) is a daughter of Sophia A. Belyea.

James W. Belyea's first wife died in 1864 or 1865. They had only one child, the defendant Sophia A. Belyea, and she lived with her father until the fall of 1900, when she married and moved to an adjoining place. In April, 1901, James W. Belyea married the defendant Margaret E. Belyea, he being then about seventy-three years old. There were no children by this marriage. After the second marriage he did no business, but simply lived on the interest of what money he had.

He had on deposit in the savings bank department of the Bank of Montreal, at Saint John at the time of his death, $1,550.00. That account had been opened in July, 1902. In the pass book it is stated as June, 1902, but Mr. Hazen of the Bank of Montreal, who was a witness, says that that was a mistake and it should be July.

He also had in the Dominion Savings Bank at Saint John at the time of his death, $2,978.77. That account had been first opened in April, 1893, and was continued until his death, amounts having been added to it from time to time.

He also had in the savings department of the Bank of New Brunswick $1,200. This account was opened some years prior to 1909, but I am unable to say just what time it was opened.

According to the evidence of Mrs. Belyea, the money in the banks was really all the property of which he died possessed. He did no business after his second marriage and simply lived on the interest of his money. He was in the habit of going to Saint John every year in July and drawing the interest; but in March, 1909, he was injured by an accident and was unable to move around very well, and in July of that year, he asked the defendant Margaret E. Belyea to go to Saint John and draw the interest. She accordingly went for that purpose, but the savings bank refused to pay it to her without an order from Mr. Belyea and the bank gave her one of their short powers of attorney to have Mr. Belyea sign, authorizing her to draw the interest. It is headed "Order by a depositor unable to receive payment personally."

They also at the same time gave her a form for Mr. Belyea to sign, putting the account in their joint names.

The Bank of Montreal also refused to pay and gave her their form to sign, putting the account in their joint names. That form is as follows:—

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St. John, N.B., July 22, 1909.

To the Manager, Bank of Montreal,
St. John, N.B.

Dear Sir,—Regarding our savings bank account No. 3,242, opened 2nd of June, 1902, we wish it to be understood that either (or the survivor) of us may withdraw money from time to time from such account without reference to the other or his or her legal representatives.

She took these home and James W. Belyea signed them. The Bank of New Brunswick at first refused to pay, but subsequently paid it on her undertaking to get an authority from her husband to withdraw it and they gave her a form for her husband to sign, which is as follows:—

Wickham, Queens Co., July 4th, 1910.

I hereby authorize the name of my wife Margaret E. Belyea to be added to my account 0778 on joint deposit, either of us to have the power to withdraw.

She took that home, but did not have it signed until the next year and it bears date July 4, 1910. She subsequently in July of the same year (1909), came to St. John, drew the interest ($90.00), from the Dominion Savings Bank on July 22nd and on July 27th, the account was changed from Mr. Belyea's name into the joint name of himself and Mrs. Belyea.

She also drew the interest from the Bank of Montreal, and that account was changed into the joint names of herself and her husband. Whether it was changed on July 22nd or later I am unable to tell. It would appear, however, from the pass book, that it was changed on July 22nd.

There was no change made that year in the account of the Bank of New Brunswick, but in July of the next year, 1910, she came to Saint John to draw the interest and brought with her the authority, signed by Mr. Belyea, to put it in their joint names and the Bank of New Brunswick on July 6th gave her a deposit receipt by which they made the money payable to either or the survivor of them.

As I have said, James W. Belyea died on the 26th of January, 1911. This bill is filed by the executors to have a construction placed upon the will.

The defendants Margaret E. Belyea, Sophia A. Belyea and Edna Belyea (by her guardian) raise the two questions that are involved. First they claim that this money in the different banks is the property of Margaret E. Belyea, as it was in the banks in the name of both James W. Belyea and Margaret E. Belyea, with the right to either, to withdraw, and in the case of the Bank of Montreal and the Bank of New Brunswick with the right to the survivor to withdraw.

Secondly, they say that the bequests to the Episcopal Denomination, the Methodist Denomination and the Free Baptist Gen-

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eral Conference are not charitable bequests and that they fail for uncertainty.

It appears to be settled that when a husband transfers money or other property into the name of his wife, there being nothing one way or the other to explain it, that the presumption is that it is intended as a gift or an advance to the wife absolutely at once, subject to his marital control as he may exercise it. And if a husband invests money in stock or otherwise in the name of himself and his wife, there being nothing to explain it, then also there is a presumption that it is an advancement for the benefit of the wife absolutely, if she survives her husband; but, if he survives her, then it reverts to him as joint tenant with the wife. *See In re Eykyn's Trusts*, 6 Ch. D., page 115, at page 118. See *Debury* v. *Debury* (No. 2), 2 N.B. Eq. R. 348 at page 353 and cases there cited.

But that is a presumption that may be rebutted and the surrounding circumstances may be looked at to ascertain whether or not it was given absolutely to the wife. I am obliged therefore in this case to take into consideration all the circumstances as a juryman and see whether or not they rebut that presumption.

After having taken into consideration all the surrounding circumstances of this case, I have come to the conclusion that they shew that the account was changed and put in their joint names as a matter of convenience and not to vest the money in Mrs. Belyea. The evidence as to the reasons for changing the account is given by Mrs. Belyea herself, and I decide this question on the strength of her testimony.

As I have already said, it appeared in evidence that James W. Belyea did no business after his marriage with the defendant Margaret E. Belyea. Her statement is that he collected his mortgages and notes and deposited them from time to time in the banks and always went to Saint John and drew the interest himself until the time of his accident in March, 1909, and then being unable to go, he asked her to go for him. I will refer to some parts of her evidence. On her direct examination she says, page 51 of the record, as follows:—

> Q. There were some moneys in the banks spoken of here? A. Yes.
>
> Q. That was formerly in his own name? A. Yes.
>
> Q. Was the account used for household purposes? A. Yes.
>
> Q. Will you explain the changing of the account from his own name to yours and his? A. Yes, he got hurt and was unable to get here and he gave me power to come and draw his money. I drew it two years, the interest, and he told me if I needed more, I could draw money when I wanted it, principal or anything. I kind of felt as if I had right to it.
>
> Q. The moneys you drew at different times in the two years, how was it used? A. Used for the house.

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At page 52, she says as follows:—

Q. Take the Bank of Montreal, when this document now in evidence in reference to changing the accounts came up, he had it for some time, had he? A. I gave it to him.

Q. And before he signed it he had an opportunity of examining it? A. He wrote it and said to me to come and see about it, to the magistrate, and get a witness or two. So they came in and fixed it up and he said to me: Now says he, it's all right, you can draw money whenever you want it.

On cross-examination, she is asked the age of her husband when he died, and she said he was 83.

At page 57, she said in answer to questions as follows:—

Q. What was the nature of the accident in March? A. He broke his hip.

Q. Was he incapacitated from moving? A. He got around about five months with crutches and from that went with a cane. I wanted him to go to town the last year he lived and he said he couldn't get in and out of coaches, said I had the power to draw, and I could do.

Q. After that March, when July came around he asked you to come down and get the interest? A. Yes.

Q. Did you have some authority from him? A. No.

Q. Do you remember which bank you went to first? A. Yes, the savings bank.

Q. The Dominion Government Savings Bank? A. Yes.

Q. Did you apply to them for the interest and tell them who you were? A. Yes, they said I couldn't get it.

Q. Couldn't get it without what? A. Without an order.

Q. Did they prepare something for you to get signed by your husband? A. Yes.

Q. You went back and do you remember whom you saw about it? A. Mr. Robertson. He made it out for me.

Q. Made out the paper to give you authority? A. Yes.

Q. On that trip, did you see the other banks? A. Yes.

Q. You went to the Bank of Montreal? A. Yes, and they did the same thing.

Q. What did they tell you? Did you want to draw the interest? A. Yes, I told them I wanted the interest and they told me I couldn't unless I got authority and my name on the books.

Q. And they drew up something for you to take up to sign. Is that the paper that is here? A. Yes.

Q. For what purpose did you require this interest you came down to get in July? A. For living.

Q. And the Bank of Montreal gave you this paper, didn't they, dated 22nd of July, 1909? I think it is the same date as the savings bank paper? A. This is it (indicating).

Q. Did you go to see the Bank of New Brunswick too? A. Yes, I went there and they talked to me a while, and said of course, they hadn't a right to give it to me, but after a while one of the men came around and said: Well, I know you are Mrs. Belyea and I will give you the interest and give you a new card and made me out a

paper just like the other two and told me to bring that home and get it signed and get Mr. Belyea to sign it, if he wasn't able to come down. So I let it go then till the next year. I didn't bother, for I didn't come down, as I couldn't go away and leave him, so those two were in the bank all right.

Q. That is the Government Savings Bank and the Bank of Montreal? A. Yes.

On page 59 she further says:—

Q. What did you tell him (her husband), that you couldn't get the interest without his authority? A. I said: What did you send me down without a name on it for? He said: I thought anyone could draw it; and I said: I knew myself they couldn't, and I told him they gave these authorities and he said that was all right, he was only too glad to fix it up.

On page 61, she says:—

Q. You say your husband told you that you would be able to draw money whenever it was wanted? A. Yes, that is what he told me.

Q. Wanted for what purpose, for household purposes? A. For us to live on.

Q. That was the idea, was it? A. Yes, that was the idea.

Q. And you did draw the interest as you have told us, for the two years, 1909 and 1910? A. Yes.

Q. Did your husband know you were going down in 1910 to draw the interest? A. He did.

Q. Was it spoken of between you? A. Yes.

Q. Was it spoken of as to whether the interest would be enough? A. He said if that wouldn't do, I could go down and draw principal for he said I had the power to do it.

Q. I suppose when he was ill you did whatever business there was to do in buying things for the house and looking after things, necessarily had to do it? A. Yes, certainly.

Page 62: Q. The object was, it should be put so you could go down and draw the money when needed for household purposes, either principal or interest? A. That is what he told me, I could draw whenever we wanted to and that is what the banks told me.

Q. And that was the object of putting your name there? A. Of course.

Q. And did you draw the interest for this purpose? A. Certainly.

Q. But you didn't draw the principal, got along without it?

Q. And it arose by reason of your husband being incapacitated to attend? A. Yes.

Those are some extracts from her evidence, and taking it altogether, it shews clearly that the money was placed in their joint names as a matter of convenience, because the husband, James W. Belyea, was unable to go to Saint John and draw the interest.

The facts in this case are very similar to the facts in *Marshall* v. *Crutwell*, L.R. 20 Eq. page 328. The facts in that case, shortly stated from the head note, are as follows:—

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The husband of the plaintiff being in failing health, transferred his bank account from his own name into the joint names of himself and his wife and directed the banks to honour cheques drawn either by himself or by his wife and he afterwards paid in considerable sums to this account. All cheques were afterwards drawn by the plaintiff at the direction of her husband, and were applied in the payment of household and other expenses. The husband never explained to the plaintiff what his intention was in transferring the account, but he was stated by the bank manager to have remarked at the time of the transfer that the balance of the account would belong to the survivor of his wife and himself. After his death the plaintiff claimed the balance. Jessel, Master of the Rolls, held that she could not succeed. He says, page 329:—

> As I understand it the law is this: the mere circumstance that the name of the wife or child is inserted on the occasion of a purchase of stock is not sufficient to rebut a resulting trust in favour of the purchaser, if the surrounding circumstances lead to the conclusion that the trust was intended. Although a purchase in the name of wife or child if altogether unexplained will be deemed a gift, yet you may take surrounding circumstances into consideration so as to say that it is a trust, not a gift.

And he further says, page 330:—

> But here we have the actual fact that the man was in such a state of health that he could not draw cheques and the wife drew them. Looking at the fact that subsequent amounts were paid in from time to time, taking into consideration all the circumstances (as I understand I am bound to do), as a juryman, I think the circumstances are that this was a mere arrangement for convenience and it was not intended as a provision for the wife in the event it might happen that at the husband's death there might be a fund standing to the credit of the banking account.

In closing, he says:—

> And having regard to the rule which is now binding on me that I must infer from the surrounding circumstances what the nature of the transaction was I come to the conclusion that it was not intended to be a provision for the wife, but simply a mode of conveniently managing the testator's affairs and leaves the money still his property.

In re Daly, decided by this Court, 37 N.B.R. 483, and *Daly* v. *Brown*, 39 Can. S.C.R. 122, is a case in which the money was deposited in the name of the testator and his daughter. This Court held (and the judgment was sustained by the Supreme Court) that the circumstances shewed that it was not intended as an advancement to his daughter.

This I think may fairly be borne in mind. The money in the bank was all the property Mr. Belyea had. He was married a second time in the spring of 1901. This will was made in April

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1902, and he then made a certain provision for his wife and made no change whatever in that will. During the time prior to his accident, he from time to time deposited moneys in these banks in his own name and he himself always drew the interest and there is no reason suggested for the change except that after his accident in March, 1909, he was unable to go to Saint John to draw it, and therefore, it was necessary to give the authority to someone to draw it, and he gave that authority to his wife and instead of giving a power of attorney each time the interest was payable the money was placed to their joint account.

It is also important to note that when Mrs. Belyea first went down in 1909, for the interest, he gave her no authority, thinking she could draw it without any special authority from him, but two of the banks refused to pay it to her. The managers of the banks themselves wrote out the authority to have it put in their joint names. Placing the money in their joint names did not emanate from Mr. Belyea, but from the banks. It was their suggestion and she took the forms for that purpose home and he signed them. It was claimed and strongly claimed that as the deposits in the Bank of Montreal and the Bank of New Brunswick at the time the change was made were made payable to either or the survivor it followed that as Mrs. Belyea survived her husband, the money belonged to her. No such result followed by adding the word survivor. The question still is were the accounts changed into the names of both for the purpose of vesting the money in Mrs. Belyea, or simply for convenience, and as I have said, I come to the conclusion on the evidence that the change was made as a matter of convenience because Mr. Belyea was himself unable to go to St. John and draw the interest. I therefore come to the conclusion that this money belonged to James W. Belyea at his death and that it now should be paid to his executors.

Then as to the second question. It is claimed that the bequests to these different denominations are void for uncertainty. First, it is said that the words "Episcopal Denomination" do not describe the Church of England, or perhaps more properly speaking the Diocesan Synod of Fredericton, the body that now claims it. The same is said with reference to the Methodist Denomination.

There was a good deal of discussion before me as to whether these bequests were charitable or not, but from the view I have taken of the case I think it is not necessary to decide that. The bequests are specific to incorporated bodies. It is claimed that they are uncertain, but a devise in a will will not fail for uncertainty if the Court can arrive with a reasonable degree of certainty at who is the person intended to be benefited: *Adams* v. *Jones*, 9 Hare 485, and *Jones* (*Executor of Murdock*) v. *St.*

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Stephen's Church et al., 4 N.B. Eq. R. 316, decided by Barker, C.J., in 1910.

In the latter case the bequest was as follows:—

> I give and bequeath the sum of one thousand dollars to be paid by my said executor to the Aged and Infirm Ministers' Fund in connection with St. Stephen's Presbyterian Church in the city of Saint John.

There was not and never had been any aged and infirm ministers' fund in connection with the St. Stephen's Presbyterian Church in Saint John. There was, however, a fund connected with the Presbyterian Church in Canada, known as the Aged and Infirm Ministers' Fund in which all the ministers of the Presbyterian Church, including the ministers of St. Stephen's Church, had a right to participate, subject to certain rules and regulations of the management. The learned Chief Justice after fully discussing the matter, without deciding whether it was a charitable bequest or not, held that the bequest should be paid to the Board of Trustees of the Presbyterian Church in Canada, eastern section, for the Aged and Infirm Ministers' Fund, holding that that board sufficiently represented the fund.

I think, in this case, we can easily arrive at the intention of the testator. It is a matter of common knowledge that these different churches are spoken of and called denominations. The word denomination itself among other things denotes a class or a sect of Christians. We often hear of the Episcopal denomination, the Methodist denomination and other churches spoken of in that way and we know what church is referred to. The Church of England is known as the Episcopal denomination. The Diocesan Synod of Fredericton is a body corporate with all the powers made incident to a corporation by Act of Assembly and it is composed of the Bishop, the Coadjutor Bishop, if any, and the clergy and representatives of the laity of the Church of England within this province and this body manages and carries on both the home and foreign missionary work of the Church of England. Money for both of these missions is collected from the different churches throughout the province and paid to the treasurer of the synod, and that body appropriates it both for Home and Foreign Missions and from this mission fund is appropriated a good deal of money for Home Missions in Queens County.

The various Methodist bodies throughout Canada in 1884, were incorporated by an Act of the Parliament of Canada, into one Church called the Methodist Church and by that Act it was provided that there should be one missionary fund for the whole church. Collections are made throughout the whole of Canada for both Home and Foreign Missions and sent to a board in Toronto, that administers these funds and from these missionary

funds different churches in Queens County that are not self-sustaining are assisted.

It seems to me, therefore, that there is no difficulty in coming to the conclusion that when the testator speaks of the Episcopal denomination, he means the Church of England, which is represented by the Diocesan Synod of Fredericton, which administered the missionary funds of that church, and when he speaks of the Methodist denomination, he means the Methodist Church. I may, however, say that the specific bequest of a thousand dollars to the Methodist denomination is not objected to.

The bequest to the Free Baptist General Conference of New Brunswick is a little different. This church was formerly known as the Free (Christian) Baptist Conference, but in about 1898, the name was changed by an Act of the legislature to the Free Baptist General Conference of New Brunswick. The bequest to that church is specific by its corporate name. There was a large number of churches of that denomination in Queens County. It was claimed that there were no foreign missions in Queens County and as the words of the bequest are, "to be used by them for Home and Foreign Missions in Queens County as seems best to them" the bequest would fail.

I do not think any such result would follow. It simply means that the Conference could use it for Home or Foreign Missions as it seemed best. Of course, there could be no foreign missions as the term is usually understood, in Queens County itself.

It was further contended practically that the Free Baptist General Conference had ceased to exist and that therefore that bequest lapsed. There is no doubt that a gift to a particular institution, whether charitable or otherwise, will lapse if the institution ceases to exist before the testator dies. See *In re Rymer*, [1895] 1 Ch. 19. The question, therefore, is whether this body did cease to exist. I think it did not. By 6 Edw. 7 (1906) ch. 77, the Baptist churches in this province forming constituent parts of the eastern, southern and western Baptist Associations and the Free Baptist General Conference of New Brunswick, were united under the name of "The United Baptist Churches of New Brunswick," and the property of these different bodies was held by this new corporation.

By sec. 4 of the Act the treasurer of the Free Baptist General Conference was to pay over to the United Baptist Churches of New Brunswick all moneys and other property in his possession, which was to be held by that body upon the same trusts and uses as it had been held by the board of managers in connection with the Free Baptist General Conference. In other words, the property of the Free Baptist General Conference was simply placed in the name of this new corporation, to be used for the same purposes that it had been heretofore used.

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By section 13 of the Act, it is provided:—

> Every donation, legacy or bequest of money or land or other real or personal property before or after the passing of this Act made to any Baptist or Free Baptist Church shall vest in such United Baptist Church as shall include the church to which the said donation, legacy or bequest is made.

The Act does not destroy or put an end to the Free Baptist General Conference, it simply unites it with other Baptist bodies under a new name, but it does not in any way affect a bequest that is made to it.

There is, and was at the time of the death of the testator, a large number of Free Baptist churches in Queens County and a number of them received aid from that body. The Home and Foreign Mission work that was carried on by the Free Baptist General Conference is still carried on by the new corporation and Home and Foreign Missionary funds are collected. I therefore, think that that bequest does not fail.

As to the bequest to the Deaf and Dumb Society, it is in the following terms:—

> I give to the Deaf and Dumb Society of New Brunswick two hundred dollars.

At the time this will was made, there was no Deaf and Dumb Society in New Brunswick. There was a school being carried on at Fredericton, really as a private enterprise, though it received some Government assistance and some assistance from outside, but that school came to an end in the summer of 1903, and ceased to exist.

During the same year or possibly the next (1903), a school for the Deaf and Dumb was established in Saint John and was shortly afterwards incorporated under the name of the New Brunswick School for the Deaf. It has since been carried on and is now being carried on. It is the only society of the kind in New Brunswick. The testator evidently intended to assist the deaf and dumb and bearing in mind that by our own Act the will speaks from the death of the testator, this school being in existence and the only school or society in existence for the deaf and dumb in New Brunswick, I think it is clear that he intended to give it to them. He certainly intended to make a bequest to the Deaf and Dumb Society of New Brunswick and this is the only Deaf and Dumb Society there is in New Brunswick, I therefore think that that bequest is good.

The order will, therefore, be that the moneys in the banks were the property of the testator at the time of his death and now belong to the executors and should be paid to them, that the bequest of one thousand dollars to the Episcopal Denomination shall be paid to the Diocesan Synod of Frederieton and the bequest of one thousand dollars to the Methodist Denomination

shall be paid to the Methodist Church, and the bequest of one thousand dollars to the Free Baptist General Conference be paid to the United Baptist Church and that at the death of Sophia A. Belyea the one thousand dollars bequeathed to her for life be divided equally between these three churches and on the death of Margaret E. Belyea, the twelve hundred dollars bequeathed to her for life be divided equally between these three churches. That all the moneys so bequeathed to these three churches be held by them on the trusts contained in the will. That the two hundred dollars to the Deaf and Dumb Society be paid to the New Brunswick School for the Deaf. The costs will be paid out of the residuary estate; the plaintiffs' costs to be taxed as between solicitor and client, to be a first charge on the residuary estate.

Declaration accordingly.

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Ontario Divisional Court, Falconbridge, C.J.K.B., Britton and Riddell, JJ. June 25, 1912.

1. INFANTS (§ I C—11)—PARENT'S RIGHT TO CUSTODY OF—AGREEMENT SIGNED BY FATHER GIVING CUSTODY OF INFANT TO GRANDPARENTS—EFFECT OF STATUTE—1 GEO. V. (ONT.) CH. 35, SEC. 3.

Section 3 of 1 Geo. V. (Ont.) ch. 35, providing that the father of a minor child may at any time by deed dispose of its custody and education for any length of time while the child remains under the age of twenty-one years and that such disposition shall be good and effectual against every person claiming in any way the child's custody or education, does not apply to make irrevocable an agreement signed by a widower relinquishing the custody of his infant daughter to her maternal grandparents until she reaches her majority or marries under that age, and covenanting that the father will not revoke the instrument.

[*Fidelity Trust Company* v. *Buchner*, 5 D.L.R. 282, 26 O.L.R. 367, followed; *Chisholm* v. *Chisholm* (1908), 40 Can. S.C.R. 115; *Roberts* v. *Hall* (1882), 1 O.R. 388, at pp. 404, 406; *Re Davis* (1909), 18 O.L.R. 384; *Lord Westmeath's Case* (1819), Jacob 251, note (e); *Humphrys* v. *Smith* (1853), 17 Jur. 24, 22 L.J.N.S. Q.B. 116, 16 Eng. L. & Eq. 221; *Re O'Hara* (1900), 2 I.R. 232, at p. 241; Halsbury's Laws of England, vol. 17, p. 123; Macpherson on Infants 83, specially referred to; *Re Hutchinson*, 26 O.L.R. 113, reversed on appeal.]

2. HABEAS CORPUS (§ I C—14)—PROCEEDINGS FOR CUSTODY OF A CHILD—EFFECT OF A DULY EXECUTED AGREEMENT BY FATHER GIVING CUSTODY OF INFANT TO GRANDPARENTS.

A signed and sealed agreement by a father giving the custody of his infant daughter to her maternal grandparents until she reaches her majority or marries under that age and covenanting that the father would not revoke the instrument, is not a bar to the father's application for a writ of habeas corpus to obtain the custody of his child.

[*Re Hutchinson*, 26 O.L.R. 113, reversed on appeal.]

3. PARENT AND CHILD (§ IV—40)—FATHER'S RIGHT TO CUSTODY OF INFANT DAUGHTER—AGREEMENT GIVING CUSTODY TO INFANT'S GRANDPARENTS—EFFECT OF.

Where a father of an infant daughter is respectable, of good habits, industrious, trustworthy, steadily employed, and nothing is shewn as to his character and habits such as would disentitle him to insist upon

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his strict legal rights in regard to his daughter, he will be entitled to her custody though he signed and sealed an agreement relinquishing her custody to her maternal grandparents until she reached her majority or married under that age and covenanting that he would not revoke the instrument.

[*Re Faulds*, 12 O.L.R. 245; *The Queen* v. *Gyngall*, [1893] 2 Q.B. 232, *per* Lord Esher, at p. 239; *Re O'Hara*, [1900] 2 I.R. 232, specially referred to; *Re Hutchinson*, 26 O.L.R. 113, reversed on appeal.]

4. INFANTS (§ I C—11)—CUSTODY OF—GROUND FOR GIVING CUSTODY TO STRANGER—IMPECUNIOSITY OF PARENT.

Generally speaking the best place for an infant is with its parents and merely because the parent is poor and the person who seeks to have possession of the child is rich and for that reason its pecuniary position will be bettered by the change, a child should not be taken away from its parent without regard to any other consideration of the natural rights and feelings of the parent.

[*The Queen* v. *Gyngall*, [1893] 2 Q.B. 232, *per* Lord Esher, at p. 243, followed.]

Statement

W. H. Hutchinson, the father of Adah May Hutchinson, a child of two years, appealed from the order of BOYD, C. (also reported, 26 O.L.R. 113), upon the return of a *habeas corpus*, refusing to order the child to be delivered to the appellant, by the child's maternal grandparents, the respondents.

The appeal was allowed.

The judgment appealed from is as follows:—

Boyd, C.

March 29, 1912. BOYD, C.:—It is always unsatisfactory to deal with disputed facts as set forth in conflicting affidavits. There is a mass of material before me, which I have carefully perused, and find that there is a cumulation of domestic details on which the various deponents contradict each other in an embarrassing manner. Disregarding the smaller discrepancies, I should judge, despite all the divergent opinions, that there is no danger likely to arise to the child, whether she stays with her grandparents or goes to her father, in regard to any tubercular infection. Nor do I think there is any lack of affection on the part of the father, though it may be he is not so attractive to the child as her grandparents. They have been to all intents *in loco parentis* to this young girl since her birth. The parents of the infant lived in the house and home of the maternal grandparents from the date of their marriage till the death of the wife on the 7th December, 1911, with a short interval from April to the middle of July, 1911, when the parents occupied another house. But during these few months the infant was left with the grandparents. The child was born in August, 1909, and is yet under three years of age—said to be an active, healthy child, yet easily excited and needing careful treatment.

I have no manner of doubt that the child cannot be better placed than to be left with the grandparents; they are well to do, living in a roomy house, with a large lot, in which the child

can play. The character of the grandparents is beyond reproach, and they stand particularly well in the opinion of the neighbours and townsfolk of Tillsonburg. They are devotedly attached to the child, as is the child to them, and they have really had everything to do with and for the child in its sleeping, clothing, maintenance, and personal supervision. The opinion I have formed on this head was shared in by the father himself in his conversation with Ernest Tretheway, and by Dr. Reid. It is also the opinion (for what it is worth) of Mr. and Mrs. Honsberger, who, having made affidavits to sustain the father's claim on the 20th March, explain away their statements in later affidavits made on the 25th March.

To hand over the child to the father would be in the nature of an experiment; he is a working man, aged about twenty-six, with no home at present; he proposes to establish one with the assistance of an elder sister, who has been for the last six or seven years working in a cutlery company's works at Niagara Falls, New York, and has had experience in looking after children. Owing to the scarcity of suitable houses in Tillsonburg, it is not likely that the father can do more than get some rooms where the child will be in a sense cooped up and with the street for a playground. The contrast between these prospects, even if the household machinery works smoothly, and the advantages possessed and now enjoyed by the child, is obvious.

No question of religion enters in to embitter the situation of the claimants; and I see no good reason why the father should not return to the household of the grandparents, as they offered to allow him to do after the death of the child's mother. He says that he would have done so had they destroyed an agreement which he signed on the 4th December, 1911. This is an instrument under seal, prepared in view of the mother's impending death, so as to place the possession, custody, control, and care of the child in the hands of the grandparents, and providing that the father shall have access to the child at all reasonable hours. This instrument is upheld by the grandparents, but is being attacked in an action by the father to set it aside, which is now pending. I must regard this at present as a valid agreement which is binding on the father. It is not for me, on such material as I have before me, to anticipate a decision of the Court on this dispute. I have no doubt that the wishes of the dying wife were that the child should be left to the care of the grandparents.

The signed and sealed agreement of the 4th December, while it stands, appears to be a bar to any such application as the present; and it is valid in law under the statutory provisions in 1 Geo. V. ch. 35, sec. 3 (O.),* taken from the revised statute in

*Secs. 2, 3, and 21 of 1 Geo. V. (Ont.) ch. 35 are as follows:—

2. (1) The High Court or the Surrogate Court, upon the application of the mother of an infant, who may apply without a next friend, may make such order as the Court sees fit regarding the custody of the infant, and

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force when the deed was executed. But, apart from this agreement, I think, upon the material placed before me, that the interests of the child will be better subserved by letting her custody remain *in statu quo;* the father having all reasonable access to the child when he so desires; this right of access to be settled by the Local Master, if the parties cannot agree.

In *Re Davis* (1909), 18 O.L.R. 384, the head-note reads that the law of this Province knows nothing of adoption; but the attention of the Court was not directed to the Act I have cited, and proceeded on the provisions of the Act relating to neglected children, and in particular those that can be called deserted and abandoned—which does not apply to this child.

It may be that the proper reading of the statute is, that the declaration that such disposition shall be good and effectual against all and every person claiming the custody and tuition of the child, does not include a father, if living. But I do not see any decided case to that effect. But, apart from the statute, if the agreement has been made by the father in pursuance of an understanding that the child was to be the heir to or inheritor of the property of the grandparents, and has been brought up by them under that impression, and if that is supplemented by an actual deed or will, irrevocable, to such effect, the Court, acting on principles of equity, will not, at the father's instance, disturb that arrangement. I refer to the considerations influencing the

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the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary or discharge the order on the application of either parent, or, after the death of either parent, of any guardian appointed under this Act, and in every case may make such order respecting the costs of the mother and the liability of the father for the same, or otherwise as the Court may deem just.

(2) The Court may also make an order for the maintenance of the infant by payment by the father, or out of any estate to which the infant is entitled, of such sum from time to time as according to the pecuniary circumstances of the father or the value of the estate the Court deems reasonable.

(3) No order directing that the mother shall have the custody of or access to an infant shall be made in favour of a mother against whom adultery has been established by judgment in an action for criminal conversation or for alimony.

3.—(1) The father of a child under the age of twenty-one years, whether born at the time of the decease of the father or at the time *en ventre sa mère*, by deed or by his last will and testament in such manner and from time to time as he shall think fit, may dispose of the custody and education of such child while he remains under the age of twenty-one years or for any lesser time to any person in possession or remainder.

(2) Such disposition shall be good and effectual against every person claiming the custody or education of such child as guardian in socage or otherwise.

(3) The person to whom the custody of such child is so committed may maintain an action against any person who wrongfully takes away or detains him for the recovery of such child and for damages for such taking away or detention for the use and benefit of the child. 12 Car. II. ch. 24, sec. 8; R.S.O. 1897, ch. 340, sec. 2.

Court in such cases as *Lyons* v. *Blenkin* (1821), Jac. 245; *Roberts* v. *Hall* (1882), 1 O.R. 388, approved of in *Chisholm* v. *Chisholm* (1908), 40 Can. S.C.R. 115.

Therefore, in the peculiar circumstances of this case, following *Ex p. Templer* (1847), 2 Saund. & C. 169, I refuse to change the custody.

I do not award costs to either side.

I can only express the earnest desire that the parties may take thought and act reasonably and considerately on both sides, so as to preserve harmony in the family and avoid a devastating litigation in the Courts, which may go far to impoverish the moneyed litigant, and to embarrass the one who is poorer.

Argument

W. N. Tilley, for the appellant, argued that the agreement was invalid, as parents could not enter into an agreement legally binding to deprive themselves of the custody and control of their children; and, if they should do so, they could at their option repudiate it: *Fidelity Trust Co.* v. *Buchner* (1912), 5 D.L.R. 282, 26 O.L.R. 367; *Humphrys* v. *Polak*, [1901] 2 K.B. 385, at p. 388; *Re Davis* (1909), 18 O.L.R. 384. The evidence shewed that the interests of the child would be best served by leaving her with her father, whose character had been unsuccessfully assailed. The appeal should succeed despite the provisions of 1 Geo. V. ch. 35, sec. 3.

V. A. Sinclair, for the respondents, contended that the father was bound by the agreement. He had abandoned the child. The onus was upon him to shew that the interests of the child demanded that it should be returned to him. This he had

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21.—(1) On the death of the father of an infant, the mother, if surviving, shall be the guardian of the infant, either alone, when no guardian has been appointed by the father, or jointly with any guardian appointed by the father.

(2) Where no guardian has been appointed by the father, or if the guardian appointed by the father is dead, or refuses to act, the High Court or the Surrogate Court may from time to time appoint a guardian or guardians to act jointly with the mother.

(3) The mother of an infant may, by deed or will, appoint any person or persons to be guardian or guardians of the infant after the death of herself and the father of the infant, if the infant be then unmarried, and where guardians are appointed by both parents they shall act jointly.

(4) The mother of an infant may, by deed or will, provisionally nominate some fit person or persons to act as guardian or guardians of the infant after her death jointly with the father of the infant, and the Court after her death, if it be shewn that the father is for any reason unfitted to be the sole guardian of his children, may confirm the appointment of such guardian or guardians, who shall thereupon be empowered to act, or may make such other order in respect of the guardianship as may be deemed just.

(5) In the event of guardians being unable to agree among themselves or with the father upon a question affecting the welfare of an infant, any of them or the father may apply to such Court for its direction, and the Court may make such order as may be deemed just.

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failed to do; on the contrary, the evidence shewed that it would be better for the child to remain with the grandparents. And the welfare of the child was always the guiding principle for the Court. He referred to *Roberts* v. *Hall* (1881), 1 O.R. 388, at pp. 404, 405; *Chisholm* v. *Chisholm* (1908), 40 Can. S.C.R. 115; *Re Ferguson* (1881), 8 P.R. 556; Eversley on Domestic Relations, 3rd ed., pp. 513, 519, 522; *The Queen* v. *Gyngall*, [1893] 2 Q.B. 232; *The Queen* v. *Barnardo* (1889), 23 Q.B.D. 305; *Re Argles* (1907), 10 O.W.R. 801; *Re Longaker* (1908), 12 O.W.R. 1193; *Re Keys* (1908), 12 O.W.R. 160; Am. & Eng. Encyc. of Law, 2nd ed., vol. 21, p. 1037. He also relied upon 1 Geo. V. ch. 35, sec. 3.

Tilley, in reply. The father has never abandoned the child. The parental right of control is supreme, and the father had never voluntarily relinquished this even for a day. He referred to *Re Faulds* (1906), 12 O.L.R. 245.

Falconbridge, C.J.

June 25, 1912. FALCONBRIDGE, C.J.:—I agree in allowing the appeal—no costs here or below.

Britton, J.

BRITTON, J.:—After a careful reading of the judgment of the learned Chancellor, and of the cases cited by him, as well as the cases cited upon the argument, I am of opinion that, notwithstanding 1 Geo. V. ch. 35, sec. 3, this appeal should succeed.

The agreement made on the 4th day of December, 1911, between the parties, is not binding upon the appellant. The appellant, as father of the infant girl, is entitled to her custody. I quite agree with the Chancellor in this, that the character of the grandparents (respondents) is beyond reproach—and that the interests of the child would very likely be better subserved by leaving her custody to remain *in statu quo*, the father having all reasonable access to the child when he so desires; but, as a matter of law, the father is entitled to revoke or ignore the agreement made by him. Nothing has been shewn as to the character or habits of the father such as would disentitle him to insist upon his strict legal rights.

The appeal will be allowed. In view of the agreement and the perfect good faith of the respondents, there should be no costs of appeal or below. It will be greatly regretted, later on, if some amicable arrangement be not made between the father and grandparents in reference to this child. If the order allowing the appeal must issue, it will be when and on terms mentioned by my brother Riddell.

Riddell, J.

RIDDELL, J.:—William H. Hutchinson some years ago married Mary Pearl Burvill, the seventeen-year-old daughter of Robert Burvill and his wife, Adah J. Burvill. The young couple lived most of the time with the parents of the wife: their only child, Adah May Hutchinson, was born in that home, in

August, 1909, and the grandparents, without opposition on the part of the father at least, took charge of the infant to a great extent. The young mother got sick, and in December, 1911, was lying dangerously ill—at the point of death indeed. The grandparents were and are exceedingly fond of the child; and, in order to have possession of her, Burvill had a document drawn up by his present solicitor. He says that he told Hutchinson "it was to make the said infant . . . our child and heir if anything should happen to her mother, and that she would get our property, and if nothing did happen to his wife the paper would be no good"—"told him that it was to make her our child and heir so that he knew perfectly its purport" (affidavit of the 26th February, paragraph 7). Mrs. Burvill swears that what her husband said to Hutchinson was "that the . . . agreement was in the interest of the said Adah May Hutchinson and would make her our child and full heir" (affidavit of the 24th February, paragraph 12). The witness to the document, Adda Moore, says that Mrs. Burvill told her "that it was to make the child their heir" (affidavit of the 26th February, paragraph 5). Hutchinson says: "What he told me was that if anything happened to him, as he had no children of his own, my wife's cousins and other relations would claim his property and would take their share, and stated that the object of the paper was to prevent this—he never intimated to me that I was signing away my right to the custody of the said child" (affidavit of the 21st March, paragraph 13).

On Monday the 4th December, 1911, the document was signed, sealed, and delivered by Hutchinson, Burvill and Mrs. Burvill. It is an indenture between Hutchinson, of the first part, and Burvill and his wife, of the second part. After reciting that Hutchinson was the father of the child Adah May Hutchinson, born on the 16th August, 1909, that she had largely resided with her grandparents, that "Mary Pearl Hutchinson is now seriously ill and may not recover, and it has been agreed that in the event of her death that (*sic*) the said grandparents shall assume the care and maintenance of the said child and take over the custody of the same and the said father has agreed thereto," the indenture proceeds: "Now this indenture witnesseth that, in consideration of the premises and the sum of one dollar paid by the parties of the second part to the said father, the said father hereby grants and assigns to the said parties of the second part all his rights to the possession, custody, control, and care of the said infant child Adah May Hutchinson, and all the right and advantage to be derived from the custody and possession of the said child, until she attains her majority or marries under that age. And the said father hereby appoints the said parties of the second part to be the guardians of the personal estate of the said infant Adah May Hutchinson until she shall attain the

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age of twenty-one years or marries, and doth hereby covenant and agree not to revoke this appointment or appoint any other person to be the guardian of said child, and the said parties of the second part hereby adopt the said child and covenant and agree with the said party of the first part that until such time as the said child attains the age of twenty-one years or marries they will maintain, lodge, clothe, and educate the said child in the manner suitable to the position of the said parties of the second part, to the same extent and in the same manner as if the said Adah May Hutchinson was their own lawful child, and will at their own expense provide the said child with all necessaries, and will pay and discharge all debts and liabilities which the said child may incur for necessaries, and will indemnify the said party of the first part against all actions, claims, and demands in respect thereof. And the said parties of the second part further agree that the party of the first part shall have access to the said child at all reasonable times, and the father on his part covenants that he will not try to use such visits for the purpose of influencing the said child to leave the said grandparents. And it is further covenanted and agreed that he will not, nor shall any person claiming under him, interfere in any way with the rights of the said parties of the second part in the control and custody of the said child."

On the evening of Tuesday the 5th December, as Hutchinson says, he asked to see the document, and, when he saw the contents, he at once told Burvill that he never had intended to sign such a document, and asked to have the document cancelled. This is not assented to by Burvill; but all parties agree that Hutchinson and his brother Clarence Hutchinson went to Burvill within a very short time (it is sworn by Clarence to have been on Thursday the 7th December), and wanted Burvill to destroy the paper.

The affidavits are conflicting as to whether the dying woman also desired the document to be cancelled; but there is no doubt that Burvill and his wife ultimately refused, and insisted on their rights thereunder: they "refused and always have refused to have this destroyed and claimed they were still in full force," says Mrs. Burvill (affidavit of the 24th February, paragraph 14); "refused to cancel the same," says Burvill (affidavit of the 26th February, paragraph 9).

On the 18th January, 1912, the father tried to take the child away, but the grandparents prevented it by force. Hutchinson then issued a writ to have the document set aside; but, being advised by counsel that the document did not require to be set aside, he sued out a writ of *habeas corpus;* on the return, the Chancellor refused to order the child into the custody of her father (also reported 26 O.L.R. 113); and the father now appeals.

The judgment in the Court below proceeds upon two grounds of different character.

First, upon the instrument, the learned Chancellor says: "I must regard this at present as a valid agreement, which is binding on the father." "The signed and sealed agreement of the 4th December, while it stands, appears to be a bar to any such application as the present; and it is valid in law under the statutory provisions in 1 Geo. V. ch. 35, sec. 3, taken from the revised statute in force when the deed was executed."

In *Fidelity Trust Co.* v. *Buchner*, 5 D.L.R. 282, 26 O.L.R. 367, I had occasion, in deciding as to adoption, to consider the effect of this statute; and I refer to that case for most of the authorities which led me to the view that the statute has no application to such a case as the present.

I add Halsbury's Laws of England, vol. 17, p. 123, sec. 287, where, citing 12 Car. II. ch. 24, sec. 8, and 49 & 50 Vict. (Imp.) ch. 27, secs. 3, 4, it is said: "Both a father and mother have power, if under age by deed, and if of full age by deed or will, to appoint persons to act as guardians of an infant child, in the case of a father, *after his death*. . . . Where the appointment is made by deed, it is of a testamentary nature, and is revocable by a subsequent will making a different appointment."

In *Lord Westmeath's Case* (1819), Jacob 251, note (*c*), Lord Westmeath had, by indenture of the 17th December, 1817 (see Jacob, p. 127), covenanted to permit his "daughter and such other child or children as they might have between them, to be and reside with their mother [the defendant], and to be educated under her care and superintendence. . . ." One could not find any case more within the words of the Act if the provisions of the Act were intended to be applicable, the father living: this was "to dispose of the custody and education;" but Lord Eldon, upon an application by way of *habeas corpus*, nevertheless ordered "Lady Rosa Nugent, aged five years, and Lord Delvin, aged seven months," to be delivered to their father (Jacob 251, note (*c*)).

In Macpherson on Infants, p. 83, it is said: "Such a deed" (*i.e.*, a deed under 12 Car. II. ch. 24, sec. 8) "certainly resembles a will in some respects; for it has no operation during life, and is revocable at pleasure." *Cf.* Schouler, sec. 287.

Holding then, as I do, that the statute does not apply to the present case, it is necessary to consider whether, outside the statute, this document has any validity to bind the father.

The law is nowhere better expressed than in the judgment of the Chancellor in *Roberts* v. *Hall* (1882), 1 O.R. 388, at p. 404: "The general rule is indisputable, that any agreement by which a father relinquishes the custody of his child, and renounces the rights and duties which, as a parent, the law casts upon him, is illegal and contrary to public policy." And at p. 406: "The father could have interfered at any moment and put an end to

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the arrangement if he found that it was being carried out disadvantageously to the child."

In *Regina* v. *Smith* (1853), 17 Jur. 24, a father had in May, 1852, entered into a written agreement, reciting that his wife, being dangerously ill, had, with his consent, requested E. Smith, her brother, to take charge of, educate, and bring up her infant daughter, born June, 1847, which E. Smith had agreed to do on condition that the infant should remain with him until she was grown up and able to provide for herself. The document then proceeded with an agreement on the father's part to permit the infant to reside with E. Smith till she should be grown up, etc., and that he "would not in any way interfere with the said E. Smith in the bringing up and education of his said daughter, nor remove nor seek to remove her from the care of the said E. Smith, but would at all times permit her to remain with him as his adopted child;" and he agreed to pay E. Smith 14*s.* per month for her support and education. The mother died in July, 1852. In January, 1853, a writ of *habeas corpus* having been taken out by the father, Erle, J., apparently with much reluctance, held: "The father is at liberty to revoke the consent, and is therefore entitled to the custody of the child:" *S.C.*, 22 L.J. N.S.Q.B. 116, 16 Eng. L. & Eq. 221.

I adhere to the decision in *Re Davis* (1909), 18 O.L.R. 384: "Parents cannot enter into an agreement legally binding to deprive themselves of the custody and control of their children; and, if they elect to do so, can at any moment resume their control over them."

Humphrys v. *Polak*, [1901] 2 K.B. 385, is also in point. "What," says Stirling, L.J., at p. 390, "is the bargain in this case. . . . ? It is in substance that the child is to remain in the possession of the defendants for the purpose of enabling the defendants to treat the child as their own and relieve the mother of all responsibility in connection with the bringing up of the child; in other words, the defendants were to undertake the duties which the law imposes on the mother, and to have the rights which the law gives her in relation to the child. In my opinion, the law does not permit such a transfer of the mother's rights and liabilities." See also *Lord St. John* v. *Lady St. John* (1805), 11 Ves. 526, 531; *Hope* v. *Hope* (1857), 8 De G. M. & G. 731; *In re O'Hara*, [1900] 2 I.R. 232, at p. 241: "English law does not recognise the power of bindingly abdicating either parental right or parental duty:" *per* FitzGibbon, L.J.

Roberts v. *Hall*, 1 O.R. 388, has been cited as against this doctrine; but all that case actually decides is, that, even though one party to a contract could not be compelled to carry out his part, if he does in fact carry out his part, the other party is bound to carry out his. We need not consider whether this would be held to be law since the case in the Supreme Court of *Chisholm*

v. *Chisholm* (1908), 40 Can. S.C.R. 115. This case seems to me to be against the respondent rather than for him. The plaintiff, being left a widow with one daughter, agreed with her father-in-law that he should become guardian to the child, educate her in a convent, and then provide for her, the plaintiff to have an allowance of $500 per annum. The Chief Justice and Davies and Maclennan, JJ., considered that the appointment of the defendant as guardian was authorised by the Nova Scotia law; that that was a sufficient consideration. The latter two learned Judges held that there was no surrender of the natural duties of mother to child "beyond those involved in the transference to the grandfather of the legal guardianship under the Nova Scotia statute" (p. 122). These learned Judges held the contract to pay the $500 *per annum* valid. But Idington, J., held that no power existed to make the defendant guardian, and that the only consideration was the surrender of the child, and this is "either no consideration or an illegal consideration" (p. 125). Duff, J. (p. 127): "The defendant's promise . . . resting upon the consideration of her undertakings respecting the education and guardianship of her child and upon that consideration alone, is such a promise as, under our law, the Courts cannot enforce." The learned Judge assumed that the Nova Scotia law permitted the appointment of the defendant as guardian (p. 126).

The document not being a bar, there is no need to have it set aside—it is not, perhaps, wholly without significance that there is no provision in it that the grandchild shall be the "heir" of her grandparents.

The document, although it is not a bar to these proceedings, is not wholly to be disregarded in the consideration of the second branch of the case.

Upon an application to the Court for the custody of a child, it is not altogether, or even primarily, the parental right of the father which the Court, acting for the King as *parens patriæ*, takes into consideration, but the advantage—I use the larger word—of the child. The law gives the custody and control of his children to the father, not for his gratification, but on account of his duties; and, if he seems to have been oblivious of these duties, the Court may well decline to deliver his children over to him. An agreement that another may have such custody and control may indicate a want of sense of such duty—or it may not—according to circumstances; but it is wholly right that the fact that such an agreement has been made should be taken into consideration.

A long acquiescence in another having such custody and control may indicate disregard of parental duty—and, what is equally important, may permit a child to become accustomed to an environment from which he should not be torn. Nothing of the kind appears here: even assuming that the father wholly

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understood the document when he signed it, there was a prompt repudiation—and there was no becoming habituated to a novel situation, subsequent to and authorised by the agreement. In my opinion, then, the agreement is of little significance, if any.

There is no doubt as to the law—it is not as at the common law, where "the parent had, as against other persons generally, an absolute right to the custody of the child, unless he or she had forfeited it by certain sorts of misconduct:" *per* Lord Esher, M.R., in *The Queen* v. *Gyngall*, [1893] 2 Q.B. 232, at p. 239; but as in equity, where "the Court is placed in a position by reason of the prerogative of the Crown to act as supreme parent of children, and must exercise that jurisdiction in the manner in which a wise, affectionate, and careful parent would act for the welfare of the child. The natural parent in a particular case may be affectionate, and may be intending to act for the child's good, but may be unwise, and may not be doing what a wise, affectionate, and careful parent would do. The Court may say in such a case that, although they can find no misconduct on the part of the parent, they will not permit that to be done with the child which a wise, affectionate, and careful parent would not do. The Court must, of course, be very cautious in regard to the circumstances under which they will interfere with the parental right. . . . It must act judicially in the exercise of its power. . . . In the case of *In re Fynn* (1848), 2 DeG. & S. 457, Knight Bruce, V.-C., said: 'Before this jurisdiction can be called into action . . . it' [*i.e.*, the Court] 'must be satisfied, not only that it has the means of acting safely and efficiently, but also that the father has so conducted himself, or has shewn himself to be a person of such a description, or is placed in such a position, as to render it not merely better for the children, but essential to their safety or to their welfare, in some very serious and important respect, that his rights should be treated as lost, or suspended—should be superseded or interfered with. If the word "essential" is too strong an expression, it is not much too strong.' That is a clear statement that the Court must exercise this jurisdiction with great care, and can only act when it is shewn that either the conduct of the parent, or the description of person he is, or the position in which he is placed, is such as to render it not merely better, but—I will not say 'essential,' but—clearly right for the welfare of the child in some very serious and important respect that the parent's rights should be suspended or superseded."

In the case of *In re O'Hara*, [1900] 2 I.R. 232, a woman in poor circumstances had entered into an agreement whereby one McMahon, a man of some means, adopted her daughter, about nine years old—the young girl having previously been in an Orphan Society's Home. About eighteen months after, she demanded her child, and McMahon refused. Upon proceedings

on *habeas corpus*, McMahon deposed that he and his wife were both much attached to the child and that the child was very fond of them. There was no difference of religion. Kenny, J., saw the child, and was satisfied that she regarded with the strongest aversion the idea of returning to her mother; and he decided that, having regard to the mother handing over the child under the agreement, and the circumstances and the existing position of the child, she should not, from the point of view of her own welfare, be taken from the custody of McMahon. Upon an appeal being taken by the mother, McMahon lodged an undertaking to maintain and educate the child in a proper manner until she was twenty-one or married with the approval of the Rector, and then to pay her £20, charging his property with the payment. The Court of Appeal (Lord Ashbourne, C., FitzGibbon and Holmes, L.JJ.) unanimously reversed the decision—though McMahon was "a decent, honest man of his class, of a blameless character" (p. 236), "a very respectable man" who had "given his evidence fairly" (p. 237). While the examination of the child by Kenny, J., was approved of, it was considered, "on the other hand, the parent's *primâ facie* right must also be considered, and the wishes of a child of tender years must not be permitted (to use the words of Lord Campbell) to subvert the whole law of the family, or to prevail against the desire and authority of the parent, unless the welfare of the child cannot otherwise be secured. . . . Misconduct, *or* unmindfulness of parental duty, *or* inability to provide for the welfare of the child, must be shewn before the natural right can be displaced. Where a parent is of blameless life, and is able and willing to provide for the child's material and moral necessities, in the rank and position to which the child by birth belongs—*i.e.*, the rank and position of the parent—the Court is, in my opinion, judicially bound to act on what is equally a law of nature and of society, and to hold (in the words of Lord Esher) that 'the best place for a child is with its parent'" (pp. 240, 241). FitzGibbon, L.J. (p. 241), goes on to say: "Of course I do not speak of exceptional cases . . . where special disturbing elements exist, which involve the risk of moral or material injury to the child, such as disturbance of religious convictions or of settled affections, or the endurance of hardship or destitution with a parent, as contrasted with solid advantages elsewhere. The Court, acting as a wise parent, is not bound to sacrifice the child's welfare to the *fetish* of parental authority, by forcing it from a happy and comfortable home to share the fortunes of a parent, however innocent, who cannot keep a roof over its head, or provide it with the necessaries of life." The whole judgment of the Lord Justice, full as it is of masculine common sense, well repays perusal. Holmes, L.J. (p. 253), says: "The period during which a child has been in the care of the stranger is always an

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important element in considering what is best for the child's welfare. If a boy has been brought up from infancy by a person who has won his love and confidence, who is training him to earn his livelihood, and separation from whom would break up all the associations of his life, no Court ought to sanction in his case a change of custody. But I never heard of this principle being acted on where a boy or girl under the age of eleven has spent less than two years with the person who resists the parent's application. It is one of the advantages of youth that it can adapt itself to altered circumstances with a facility which disappears with advancing years. . . . ."

The welfare of a child, in a case like the present, means welfare in its widest sense. Pecuniary benefit is often a very secondary consideration. "Every wise man would say"—I am quoting Lord Esher in *The Queen* v. *Gyngall*, [1893] 2 Q.B. at p. 243—"that, generally speaking, the best place for a child is with its parent. . . . It cannot be merely because the parent is poor and the person who seeks to have possession of the child is rich, that, without regard to any other consideration, to the natural rights and feelings of the parent, . . . the child ought to be taken away from its parent merely because its pecuniary position will be thereby bettered."

I also refer to the admirable judgment (if I may without presumption say so) of Mr. Justice Anglin in *Re Faulds*, 12 O.L.R. 245, in which that learned Judge considers the cases some of which I have quoted from.

There is and can be no pretence that the applicant here is other than of good character—one witness, indeed, says he has heard him swear many times, and Mr. and Mrs. Burvill both say he swore at his wife. This is emphatically denied—but, even so, I should fear for many a father if an occasional oath—however reprehensible, and on that opinions might differ—were to be a reason for depriving him of his children. Some think him crusty and quick-tempered, some do not—that, again, is a matter of degree, and nothing is adduced to shew that he is below the average in morals or manners. Nothing which, by the wildest stretch of the imagination, could be called misconduct is even alleged.

The facts or alleged facts adduced to shew unmindfulness of parental duty are almost absurdly petty. It is said that, all living together in the same house, the baby slept with her grandparents; that the father objected to her sleeping with him; and, "when she required to be nursed or fed or attended to during the night, he never did it, but" the grandfather "looked after the said child and assisted her mother in taking care of the child, while the said father slept; and it was the same during the day, if the child required any attention; the said father would insist on Burvill and wife looking after the baby . . . ; he

. . . . has refused to take his share of responsibility in connection with the said child and her care, and has left the entire care of the said child to the mother and to Burvill and his wife" (the grandparents), "leaving" Burvill and his wife "to walk up and down with the said child and look after her." As the grandmother says, "he . . . would not get up during the night to look after the baby, and, while she was a baby, my husband would get up and carry her into her mother's room, and would then have to go back again and bring the baby back again to our room, the father refusing to be disturbed, and the said baby has always slept with my said husband and myself from a week after her birth, and I never knew the father to look after the baby around the house. . . ." The father says that the grandparents "have always wanted to have my said . . . child . . . with them, and I allowed them to do so to please them and to please my wife, who was in delicate health—that, on account of my wife being in delicate health, the child slept but very little with my said wife, and the grandparents . . . always wanted to keep the child with them, and if the child happened to be with myself and wife and awoke in the middle of the night, the said Robert Burvill would invariably come and take the child away; and, if I raised any objection, he was always offended; and, for the purpose of keeping the peace and not annoying my wife, I practically allowed the said Robert Burvill and his wife to have almost the entire custody of the child."

Even without this explanation, one does not require to be a wizard to understand how matters went on in that house. A couple with one child, a daughter, that one ewe lamb taken very young by an outsider, one and only one grandchild born in their house—what chance had the father, even if he wished to do so, to take any part in the rearing of that baby? Does any grandmother imagine that her son-in-law, or, indeed, even her own daughter, knows anything about bringing up a child? Is the man who snatched from them their only child also to get possession of their only grandchild? And, even if he did not wish his sleep to be broken by a crying infant, it is understood that this is not without precedent in the tenderest and most conscientious of fathers.

Then it is said that he refused to wheel the child in a baby-cart, saying he was no dray-horse and the like. He explains that this was only on one occasion when he intended to drive his wife and child in a buggy. But, suppose he did refuse, hundreds of fathers have done the like without being considered unnatural.

It is quite plain that the grandparents are passionately fond of the child; as the grandmother swears, "we always claimed the said baby and claimed her to be ours because we had brought

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her up and looked after her;" as another affidavit has it, "the . . . grandparents . . . appeared to be, so far as their actions shewed, the parents of the said infant. . . ." They are jealous of the father, as they would be of any one who should seek to interfere with their charge of the child, a wholly natural jealousy; and they magnify trifles, adduce everything, however small, which might help them to hold on to their darling. But, when all is said, there is nothing which shews that the father is unmindful of his parental duties.

Then is there any inability to provide for the welfare of the child? I do not see any. The father is healthy—the attempt to shew or at least to suggest that he is tuberculous, desperate as the attempt was, wholly fails, in view of what his medical man swears. He is respectable, of good habits, industrious and trustworthy. He is steadily employed, and attends to his work continuously, in a tool factory. He intends to take up house and have his sister keep house for him; she is about thirty years of age, and was trained in house-work by her mother, who died about twelve years ago; for some years before that time she had everything to do in the house on account of her mother's ill-health, and after her mother's death she brought up her younger brothers; she has at different times acted as nurse and taken special care of children. She swears that she is fond of children, and has been in contact with them a great deal—she has, indeed, for the last six or seven years worked for a cutlery company in New York State, but those who should know her best say that she is a steady, competent, experienced girl, a capable and careful housekeeper, quite able and fit to look after her brother and his child.

It is suggested rather than said that the expectations of the child will be diminished by placing her in the hands of her father. That, I decline to believe. It is not at all probable that grandparents so fond as these undoubtedly are could be unreasonable enough, mean enough, to punish an innocent child for being taken away from them through no fault of her own. But, if it be so, "pecuniary benefit is often a very secondary consideration"—and more so in this new land than in the older countries. We have a different system of society, a different way of looking at life, in Canada from that in England or Ireland. In the case of a boy in a land where every one works except the criminal, the tramp or the helpless cripple, a legacy is generally or at least often more of a curse than a blessing. It may not be quite the same in the case of a girl; but the possession of a small legacy is by no means of such importance with us as in some countries. In any case, the hope of a legacy from grandparents must in this case be but as the small dust of the balance.

The child must be expected to grieve for a while, but youth is elastic, and she will soon become accustomed to her new sur-

roundings. And, without pretending to more than "common knowledge" on the subject, I venture to think that the future happiness and welfare of the little girl will not suffer from her being intrusted to an aunt of rather decided views, the father remaining near to see that the discipline is not too rigid, rather than being left in charge of doting grandparents, who have no other issue—there is, to say the least, rather less chance of the child being spoiled.

I think the appeal should be allowed without costs here or below; the order not to issue until the father files an affidavit shewing that he has procured a suitable house or rooms for himself and child.

A mass of affidavits has been filed, containing much irrelevant material—the climax of absurdity in that regard is reached by the filing of a petition signed by a number of neighbours, giving their opinions as to the proper custody of the child. This will be taken off the files—the Court does not decide cases according to the wishes or views of neighbours, however respectable; and the solicitor should have known better than to offer such a document. Many allegations are solemnly sworn to which can have no possible bearing upon the case.

I conclude by joining the Chancellor in the wish expressed in the last paragraph of his judgment.

Appeal allowed.

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Ontario Divisional Court, Meredith, C.J.C.P., Riddell, and Kelly, JJ. August 20, 1912.

1. BROKERS (§ II B—12)—REAL ESTATE AGENT—COMMISSION—SUFFICIENCY OF SERVICES—SALE EFFECTED THROUGH ANOTHER AGENT.

A real estate agent is not entitled to any commission, upon the ground that while his services were a *causa sine qua non* they were not a *causa causans*, where it appeared that he communicated with a prospective purchaser and went to the owner and asked her if she would sell her house and she authorized him to obtain a purchaser upon the usual terms as to commission, and finally an agreement of sale was entered into between the owner and the prospective purchaser who signed nothing and could not, therefore, be compelled to carry out the contract, and he afterwards repudiated the contract, and the owner went to the agent she had first employed and he, after having been approached by the wife of the purchaser aforesaid, finally brought about a sale of the property to him.

[*Imrie* v. *Wilson*, 3 D.L.R. 826, 3 O.W.N. 1145, affirmed, 3 D.L.R. 833, 3 O.W.N. 1378; *Barnett* v. *Isaacson* (1888), 4 Times L.R. 645; *Taplin* v. *Barrett* (1889), 6 Times L.R. 30, specially referred to; *Wilkinson* v. *Alston* (1879), 48 L.J.Q.B. 733, 41 L.T.R. 394, distinguished. See also annotation to *Haffner* v. *Grundy*, 4 D.L.R. 531-560.]

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2. BROKERS (§ II B—12)—REAL ESTATE AGENT—RIGHT TO COMMISSION—BRINGING BUYER AND SELLER INTO CONTRACTUAL RELATIONS—SALE EFFECTED BY ANOTHER.

A real estate agent is entitled to a commission if the relation of buyer and seller was really brought about by his act, however trifling, though the actual sale was not effected by him.

[*Green* v. *Bartlett*, 14 C.B.N.S. 681, at p. 685, and *Steere* v. *Smith* (1885), 2 Times L.R. 131, referred to.]

3. BROKERS (§ II B—12)—REAL ESTATE AGENT—RIGHT TO COMMISSION—WITHDRAWAL OF LAND BY OWNER—EFFICIENT CAUSE OF SALE.

The right to a commission on the part of a real estate agent is not lost by his discharge and the withdrawal of the lands from his hands before the sale if his acts were the efficient cause of the sale.

[*Wilkinson* v. *Martin* (1837), 8 C. & P. 1; *Lumley* v. *Nicholson* (1885), 2 Times L.R. 118, *per* Lord Chief Justice Coleridge, at p. 119, referred to.]

4. BROKERS (§ II B—12)—REAL ESTATE AGENT—RIGHT TO COMMISSION—ABSENCE OF BEING THE REAL AND EFFICIENT CAUSE OF SALE.

A real estate agent cannot recover a commission if, notwithstanding the original introduction of a purchaser by him, his act is not the real and efficient cause of the sale.

[*Gillow & Co.* v. *Lord Aberdare* (1892), 9 Times L.R. 12, affirming 8 Times L.R. 876, followed. See also annotation to *Haffner* v. *Grundy*, 4 D.L.R. 531-560.]

Statement

AN appeal by the defendant from a judgment (2nd May, 1912) of DENTON, Jun. J. Co. C. York, in an action tried by him (30th April), without a jury, in the County Court of the County of York.

The following statement of the facts is taken from the judgment of RIDDELL, J.:—

The facts are not complicated, but the result of the judgment, if it is to stand, would be that for the owner of real estate as soon as he wishes to sell it, the proverbial inevitable evils become a triad, and "there is nothing sure but death, taxes, and agents' fees".

I set out the facts, as I understand them, giving references where I add to or vary the findings of the learned trial Judge.

The defendant owned a house known as No. 116 Curzon street, in Toronto, which was heavily incumbered. Mr. Ponton, a real estate agent, was acting for the mortgagee (p. 50,) and foreclosure was imminent. The defendant then put the property into Ponton's hands as sole agent for sale (p. 47 etc.): Ponton seems to have made some attempt to sell, but did not succeed.

The plaintiff is a real estate agent, and, some time in August, 1911, got into communication with one J. J. Jerou, a prospective purchaser on behalf of his wife. The plaintiff went to the defendant and asked her if she would sell her house, and, if so, upon what terms, as he had a purchaser in view. The defendant then authorised the plaintiff to obtain a purchaser, on the usual terms as to commission. The price first asked was $5,000. Jerou at first offered $4,200, and finally the parties came together, and the defendant agreed to sell and Jerou to buy at $4,600, on terms of

$3,000 cash and the balance on mortgage. Jerou was in a rented house and had to move, and one of the conditions of the sale by the defendant was that he should get possession by the 15th September, 1911. Jerou signed nothing, and could not, therefore, be compelled to carry out the contract.

Jerou took the matter of getting possession into his own hands; he was attending to the matter of obtaining possession himself (p. 41), and he told his solicitor that, if he could not get possession by the 19th September, he would not take the property. Jerou went to the property, and it was arranged that he should get possession on the 19th; and, at the cost of considerable inconvenience, everything was out of the house and the property ready for him by that day (Vernon Coates's evidence). But Jerou did did not take possession, he made some complaint about the title, which was absolutely groundless, as appears by his own solicitor's evidence. He suggested taking the house for a month as tenant (p. 65), and, if he thought it was fit, he would take and buy the house. The defendant saw the plaintiff about the matter, as did her son (pp. 57, 58, 65); to the son he said, "There is a flaw in in the sale" (p. 65); to the defendant, "Well, the sale is off for some flaw in the title" (p. 58).

The solicitor for Jerou was waiting to be put in funds by Jerou, and was in a position to close the sale if he had received the funds (p. 39). He had been instructed not to carry out the transaction unless possession was given by the 19th September (p. 40). On being called upon by the vendor's solicitor on the 19th to close the sale, he replied that he had no funds, and the next day Jerou telephoned him not to carry it out (p. 40), not to close (p. 46), he was not going on with the deal (p 46). The defendant did not let the house to Jerou; but, thinking, and justifiably thinking, that the deal was off, she went again to Mr. Ponton and reappointed him (p. 51)—instructed him to try and sell it again, as he puts it.

About the 27th December, Mrs. Jerou, apparently without the knowledge of her husband, came into Ponton's office and made inquiry about the property—she said she had seen it—and it was arranged that Ponton's representative, Dunlop, should call and see Mr. Jerou in the evening. He did so: and negotiations commenced, Dunlop asking a rather high price. The Jerous then said they had been offered the property for $4,600; and Dunlop agreed to submit that figure—he saw the defendant, the terms were accepted and a contract signed, without much, if any, delay. The sale was carried out on practically the same terms as had been arranged through the plaintiff.

The plaintiff had, on the 27th September, rendered his bill to the defendant for $115 (exhibit 5); and her solicitors had, the next day, written an answer, "You are, no doubt, aware that Mr. Jerou declined to purchase;" and no reply was made by the plaintiff.

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After the sale in December, the defendant paid Ponton a commission for the sale; on the 15th February, 1912, the plaintiff issued his writ; the trial Judge has given him judgment for $115 and costs; and the defendant now appeals.

The appeal was allowed.

Argument

C. A. Moss, for the defendant, argued that the plaintiff was not entitled to commission, as he had failed to secure a binding contract from the purchaser, and the service he rendered was merely of a casual nature, and too remote to put him in the position of effective cause of the sale, which was brought about through the intervention of another agent, to whom the commission had been paid. *Copeland* v. *Wedlock* (1905), 6 O.W.R. 539, is distinguishable. He referred to Halsbury's Laws of England, vol. 1, p. 195; *Rice* v. *Galbraith* (1912), 2 D.L.R. 859, 26 O.L.R. 43; *Imrie* v. *Wilson* (1912), 3 D.L.R. 826, 3 O.W.N. 1145, where *Stratton* v. *Vachon* (1911), 44 Can. S.C.R. 395, is commented on; *Singer* v. *Russell* (1912), 1 D.L.R. 646, 25 O.L.R. 444; Evans on Remuneration of Commission Agents, 2nd ed., pp. 2, 108-113, where *Barnett* v. *Brown and Co.* (1890), 6 Times L.R. 463, and other cases are cited.

T. N. Phelan, for the plaintiff, relied upon the finding of the trial Judge that his client was the *causa causans* in bringing about the sale. It was really a question of fact, decided on the evidence by the trial Judge, and his view should prevail. There was no such unreasonable delay in carrying out the sale as would justify the conclusion that the purchaser had dropped his original intention to purchase. He referred to *Green* v. *Bartlett* (1863), 14 C.B.N.S. 681, and *Sager* v. *Sheffer* (1911), 2 O.W.N. 671.

Moss, in reply.

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August 20, 1912. The judgment of the Court was delivered by RIDDELL, J. (after setting out the facts as above):—The trial Judge finds that Jerou never abandoned his intention to buy—that may be so; I doubt it, but certainly he gave his solicitor to understand that the sale was off; the plaintiff gave the defendant to understand that the sale was off. No intimation was given to any one by Jerou that the sale was not off—and, if he had still the intention to buy, he carried that around in his head without making any external or visible manifestation of its existence, and "*de non apparentibus et de non existentibus eadem est ratio.*" The plaintiff cannot set up that the sale was not off, that Jerou had not refused to purchase; he told the defendant that the sale was off, and the defendant acted accordingly.

It cannot, in any event, I think, be considered that the intention, if any, which Jerou had in reference to this property was to buy on the basis of the arrangement made through the plaintiff, but to enter into new negotiations and buy if he could make satisfactory terms.

It is, to my mind, in every respect, as though he had no intention in the matter, but had simply refused to carry out his purchase.

So far as the facts before December go, there can be no doubt that the plaintiff could not recover; but it is contended that the subsequent sale, through Ponton, to the same purchaser, entitled the plaintiff to his commission. It may be at once admitted that the sale to Jerou would probably not have been effected had it not been for the plaintiff's retainer by the defendant and his efforts. No doubt, the plaintiff's services were a *causa sine quâ non* (to use the time-honoured terminology): but that is not enough—the services must be a *causa causans*.

In *Imrie* v. *Wilson*, 3 D.L.R. 826, 3 O.W.N. 1145, the defendant agreed to pay the plaintiff a commission if he sold certain property; the plaintiff introduced K. to the owner as a purchaser; K. was unable to purchase, but agreed with the defendant that he should try to sell for him as an agent, and did so. Mr. Justice Clute held that the plaintiff could not succeed, and this was sustained by a Divisional Court (3 D.L.R. 883, 3 O.W.N. 1378). "No doubt," says my learned brother (3 O.W.N. at p. 1147), "the introduction by Stinson (one of the plaintiffs) of K. to Wilson was the cause without which the sale would not have been effected: but was it the *causa causans*, or was there a new and distinct act which intervened which really brought about the sale? . . . It required a new act to procure a purchaser: in short, the plaintiffs' acts were not the effective cause of the sale which actually took place. The most that can be said is, that the introduction was merely a *causa sine quâ non*."

Not wholly unlike and really the converse of that case is *Barnett* v. *Isaacson* (1888), 4 Times L.R. 645. The plaintiff was to introduce to the defendant a purchaser of the business; he introduced one C., an accountant, to find a purchaser; C. did not find a purchaser, but bought on his own account. The plaintiff sued, but was held not entitled to recover.

The test is, "Was the relation of buyer and seller really brought about by the act, however trifling, of the agent?" If so, "he is entitled to commission although the actual sale has not been effected by him:" *Green* v. *Bartlett*, 14 C.B.N.S. 681, 685. And, accordingly, in *Steere* v. *Smith* (1885), 2 Times L.R. 131, where an agent took one H. to the owner and introduced him, although H. did not then make any offer but took a house in the same street, still, when H. ultimately did buy from the owner, the agent was held by Field, J., entitled to his commission. That right is not lost even by the discharge of the agent and withdrawal of the lands from his hands before the sale, if his acts before this were the efficient cause of the sale: *Wilkinson* v. *Martin* (1837), 8 C. &

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P. 1; and see *per* Lord Coleridge, C.J., in *Lumley* v. *Nicholson* (1885), 2 Times L.R. 118, at p. 119.

But if, notwithstanding an original introduction by the agent, his act is not the real and efficient cause of the sale, he cannot recover. In *Gillow and Co.* v. *Lord Aberdare* (1892), 9 Times L.R. 12, the agent was to let a house or sell the ground lease. He did procure a lessee in one T. for the same, but T. refused to deal with him for the ground lease, and dealt with another agent. It was held by Hawkins, J. (8 Times L.R. 676), that he could not recover, and this was sustained by the Court of Appeal. Lord Esher, M.R., said (9 Times L.R. 12): "The sale . . . had not been brought about by the introduction of the plaintiffs, with whom . . . T. . . . had refused to have any dealings, but had been the result of independent action on his part in going to another firm of house agents . . . ". In this case T. had said to the plaintiffs, in language not unlike that of Jerou, that, if he liked it, he might buy it.

A case more like the present is *Taplin* v. *Barrett* (1889), 6 Times L.R. 30. The defendant employed the plaintiffs, a firm of house agents, to sell a house on commission. The plaintiffs introduced S. as a possible buyer, but he made certain stipulations and did not complete the purchase. Then the defendant put the property in the hands of a firm of auctioneers, who put it up for sale by auction, and S. bought at the auction sale. The County Court Judge held that the plaintiffs could not recover, and the Divisional Court sustained that view, saying, *per* Wills, J., "that it was doubtful whether but for the auction S. would have bought at all," and holding that the only right of action the plaintiffs had was for revocation of authority. Mathew, J., points out that the contention of the plaintiffs would render the defendant liable for two commissions, one to the plaintiffs and the other to the auctioneers. Nothing turned in that case on the fact that the agents employed, after the failure of S. to complete his purchase, were auctioneers—and I am unable to distinguish the two cases.

The proposed sale to Jerou fell through, the owner of the property put the property into the hands of another agent, the previous agent did nothing more, and the new agent effected a sale. The "intention" of Jerou to buy the property some day if it suited him—if that intention did in fact exist—probably shared his mind with the "intention" to buy any other property if it suited him; and, were it even less vague than it is, is no more effective than the expressed intention of T. in the case of *Gillow and Co.* v. *Lord Aberdare*, 9 Times L.R. 12, supra. Nor is the fact that in the present case the purchaser went herself to the new agent of any more significance than that T. went to the new agent in that case.

Wilkinson v. *Alston* (1879), 41 L.T.R. 394, 48 L.J. Q.B. 733, has been said to lay down a different principle, and it was much

relied upon in the argument in the Divisional Court on the appeal in *Imrie* v. *Wilson*, 3 D.L.R. 883, 3 O.W.N. 1378, supra. But I do not think that can be successfully contended. In that case the plaintiff agreed that if the defendant should introduce a person who would become the purchaser of a ship of the defendants, he should receive a commission. In February he introduced one T. (who had been recommended to buy the ship by one W.), and the plaintiff and defendant agreed that if T. did buy, the commission should be divided between the plaintiff and W. No sale was effected, the negotiation with T. went off. In March, W. mentioned the ship to one Wise, to the knowledge of the defendant, and wrote the plaintiff to see Wise. Nothing was done by the plaintiff. In May, Wise, acting as broker, wrote direct to the defendant and introduced a principal, Learoyd, for whom he was agent, and who became purchaser. The plaintiff thereupon claimed his commission. Lush, J., thought that Wise was agent for the defendant, and that he would undoubtedly be entitled to commission from the defendant, and that "Wilkinson's information to Wise must be taken to have been only the *causa causans*" (a plain misprint for *causa sine quâ non*), "and that is not enough"—also that "it cannot be said . . . , under these circumstances, that Wilkinson by his agent procured Learoyd to become the buyer. The chain of continuity was broken." He, accordingly, dismissed the action. If the view of Lush, J., that Wise was the agent of the vendor, had been correct, this case would much resemble *Irmie* v. *Wilson*, already referred to, but it was held by the Court of Appeal that this view was not sound. The Court of Appeal held that the position of Wise was that of agent for the buyer, not agent for the vendor; that it was quite the same as though Wise were buying for himself—indeed, Bramwell, L.J., thought Wise was buying for himself—that, consequently, there was no breach of continuity, Wise having been introduced by the plaintiff and W., and a sale having resulted from this introduction. The appeal was allowed.

I can find nothing in the case, when the facts are examined, at all adverse to the view I take in the present case.

I think the appeal should be allowed and the action dismissed, both with costs.

Appeal allowed.

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KUULA v. MOOSE MOUNTAIN Limited.
(Decision No. 2.)

Ontario High Court, Middleton, J., in Chambers. May 3, 1912.

1. COURTS (§ I A—2)—CONSOLIDATION OF ACTIONS—INHERENT JURISDICTION OF COURT—R.S.O. 1897, CH. 51, SEC. 57, SUB-SEC. 9, CON. RULE (ONT.) 1897, 435.

Con. Rule (Ont.) 1897, 435, providing that actions may be consolidated by order of the court or a judge in the manner in use in the superior courts of common law prior to the Judicature Act 1881, is intended to deal with the consolidation of actions in the strict sense of that term, that is, to stay absolutely all actions but one and in that to require the party to include the whole of his claims, the jurisdiction to stay actions as part of the inherent power of the court over its own process, being recognized and confirmed by sub-sec. 9 of sec. 57 of the Judicature Act, R.S.O. 1897, ch. 51.

[*Kuula* v. *Moose Mountain* (No. 1), 2 D.L.R. 900, 3 O.W.N. 1083, affirmed on appeal.]

2. ACTION (§ II B—45)—CONSOLIDATION—PRACTICE PRIOR TO THE ONTARIO JUDICATURE ACT, 1881—MEANING OF "IN THE MANNER IN USE"—CON. RULE (ONT.) 1897, 435.

In Con. Rule (Ont.) 1897, 435, providing that actions may be consolidated by order of the court or a judge in the manner in use in the superior courts of common law prior to the Judicature Act 1881, the true meaning of the expression "in the manner in use," etc., is not to continue the practice enforced before the Act, but is to require that, if an order is made, it should be treated in the same manner as before.

[*Martin* v. *Martin & Co.*, [1897] 1 Q.B. 429, followed.]

3. ACTION (§ II B—45)—MEANING OF "CONSOLIDATION"—SEVERAL PLAINTIFFS—COMMON DEFENDANT—INJURIES FROM SPREAD OF FIRE—NEGLIGENCE.

The consolidation of four actions, each by a different plaintiff against the same defendants, cannot, upon the motion of the common defendants, be granted either in the strict sense of the word "consolidation," to stay absolutely the proceedings in three actions and to require the plaintiffs to unite all their claims in one action, or, in the looser and less accurate sense, to select one action as the test action and stay the trial of the others pending the determination of the test action, as the particular issues in each case would be distinct from the issue in the others, though each action was based upon an alleged injury to the premises of the plaintiff, caused by the spread of the same fire negligently set out by the defendants on their land and negligently allowed to spread to the plaintiffs' land.

[*Amos* v. *Chadwick* (1877), 4 Ch.D. 869, affirmed (1878), 9 Ch.D. 459; *Westbrooke* v. *Australian Royal Mail Steam Navigation Co.* (1853), 23 L.J.N.S. C.P. 42; *Lee* v. *Arthur* (1908), 100 L.T.R. 61; *Williams* v. *Township of Raleigh*, 14 P.R. (Ont.) 50, specially referred

4. TRIAL (§ VIII—340)—SEVERAL ACTIONS—DIFFERENT PLAINTIFFS—COMMON DEFENDANT—SETTING DOWN FOR HEARING AT SAME SITTING—PREVENTION OF REPETITION OF EVIDENCE.

Upon a motion by the common defendants in four actions, each brought by a different plaintiff, for an order consolidating the four actions, or for staying three of them until after the trial and the final disposition of one, where the actions involved distinct issues, though each was based upon the same cause, it was properly directed that the actions should all be set down together for hearing in order that the trial judge could take steps to prevent the repetition of any evidence common to all four actions, if there were such.

Statement

THIS is an appeal by the defendants from the order of Cartwright, M.C., *Kuula* v. *Moose Mountain, Limited*, 2 D.L.R. 900,

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dismissing an application by them for the consolidation of four actions brought by different plaintiffs against the common defendants, or for a stay of three of the actions until after the trial and final disposition of one, the defendants undertaking to be bound by the result of that one.

The appeal was dismissed.

R. C. H. Cassels, for the defendants.
H. E. Rose, K.C., for the plaintiffs.

May 3, 1912. MIDDLETON, J.:—It is said that on or about the 10th July, 1911, the defendants set out a fire upon their lands, which fire spread, and destroyed the premises of the several plaintiffs in these four actions. In each action the plaintiff presents his case in alternative ways. First, he charges that the fire set out on the defendants' premises spread to his; next, he charges that the fire was set out negligently; and, in the third place, that by reason of the negligence the fire was permitted to spread on the defendants' premises to the plaintiff's premises.

The Master, while refusing consolidation of the actions, has directed that they shall all be entered for trial at the same sittings of the Court, and at the trial the presiding Judge will, no doubt, make such arrangements as will prevent unnecessary repetition of evidence, in all the cases. But it is manifest that, if each plaintiff has to establish that the fire escaped from the defendants' premises to his premises by reason of the negligence of the defendants, the issue in each case, although similar, is quite distinct.

There is much confusion upon the subject of consolidation of actions, arising mainly from a loose and inaccurate use of the word "consolidation." As said by Moulton, L.J., in *Lee* v. *Arthur* (1908), 100 L.T.R. 61, 62: "Consolidation is much more rarely applicable than is generally supposed, because the expression is used in cases where the word is really not appropriate at all, as in cases where the trial of one action is stayed pending the hearing of another action. In a case like that the Court will not allow its process to be abused. That is often called 'consolidation,' but it is not really consolidation."

It is important, in the first place, to observe that Con. Rule 435 is intended to deal with the consolidation of actions, in the strict sense of that term. The jurisdiction to stay actions probably exists quite apart from any statutory provision, as part of the inherent power of the Court over its own process; but this power is recognised and confirmed by sec. 57, sub-sec. 9, of the Judicature Act.

Con. Rule 435 provides that "actions may be consolidated by order of the Court or a Judge in the manner in use in the

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Superior Courts of Common Law, prior to the Ontario Judicature Act, 1881." The terms of this Rule have given rise to some difference of opinion. It was at one time supposed that it permitted consolidation only in the cases in which at common law consolidation would have been ordered prior to the Judicature Act. But this has been set at rest by the decision in the Court of Appeal in *Martin* v. *Martin & Co.*, [1897] 1 Q.B. 429, where this construction of the Rule was rejected, and it is said that the true meaning of the expression "in the manner in use," etc., is not to continue the practice in force before the Act, but "that if an order is made it should be treated in the same manner as before."

At common law, consolidation originally applied to the case where there were two actions between the same parties. There the actions were "consolidated," in the strict sense of the term; the issues raised in the two actions were directed to be set up in one action. If the plaintiff unnecessarily instituted two or more actions, based upon separate claims, which could conveniently be tried together, his conduct was regarded as vexatious. If good reason existed for the separate actions—*e.g.*, if one claim was not due when the other action was brought—the Court, in the control of its own process, consolidated so as to avoid unnecessary litigation.

By statute 19 Vict. ch. 43, sec. 76—afterwards sec. 75 of the Common Law Procedure Act, C.S.U.C. 1859, ch. 22—a husband and wife, suing in respect of an injury to the wife, might join in the same suit a claim by the husband in his own right; and, if separate actions were brought, these might be consolidated. This is also true consolidation.

At common law also, a practice had grown up, not upon any statutory power, but entirely upon the inherent jurisdiction of the Court, of staying the trial of actions pending the determination of a test action. This frequently is somewhat loosely described as "consolidation." The practice was introduced by Chief Justice Mansfield in actions brought against underwriters in insurance cases. The promises of the underwriters being separate, separate actions had to be brought, in respect of any loss, against each of the underwriters. Frequently there was only one question really to be tried, such as the fact of loss. Upon the application of the defendants in such a case, the actions would be stayed, if the defendants undertook to consent to judgment in the event of the plaintiff succeeding in the test action. In the event of the plaintiff's failure, he would then either abandon the other actions or proceed with them, as he saw fit. As this relief was an indulgence to the defendants, they were compelled to consent to this somewhat one-sided bargain. See, for example, *Colledge* v. *Pike* (1886), 56 L.T.R. 124.

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Conversely, where a plaintiff, having brought several actions for similar causes of action, applied for a stay of proceedings to relieve him from the onus of prosecuting a number of actions in which he might be unsuccessful, a stay was ordered, upon the terms that, if he failed in the action which he chose as a test action, he should consent to a judgment against him in all the others.

In the Courts of equity, consolidation, in either the strict sense or the modified sense, seems to have been unknown. The Court undoubtedly exercised its power to restrain abuse of its process, and it would not permit the prosecution of two suits for the same cause of action; but the reported instances differ widely from the cases at common law. If two actions were brought on behalf of an infant by different next friends, the Court stayed the proceedings in one. If two suits were brought for administration, as soon as judgment was pronounced in one, the proceedings in the other were stayed; because the administration judgment was a judgment in favour of all. Where several suits were brought by different debenture-holders, for the purpose of realising their securities, one action alone was allowed to proceed. The principle in all these cases was, that two suits for the same relief ought not to be allowed to proceed in the same Court concurrently. See cases collected in Daniell's Chancery Practice, 5th ed., p. 698.

After the Judicature Act, in *Amos* v. *Chadwick* (1877), 4 Ch.D. 869, Malins, V.-C., construed the Consolidated Rule in the manner now rejected by the Court of Appeal; but, by virtue of the inherent power to prevent abuse of the process of the Court, he stayed until after the trial of the test action seventy-eight actions brought by different shareholders against the directors of a company for misrepresentation in the prospectus. The plaintiff selected failed to prosecute his action, and, as he did not appear at the trial, the action was dismissed. The terms of the order for consolidation appear from the report of the case in (1878), 9 Ch.D. 459. It provided that the plaintiffs, who had applied for consolidation, should be bound by the test action; but the defendants were to be at liberty to require a separate trial. After this abortive proceeding, a motion was made for relief and for the trial of another action as a test action. Malins, V.-C., then made an order substituting another action as a test action. The defendants appealed; and the sole question upon the appeal was, whether the test action had been "tried," within the meaning of the terms of the order. The Court upheld the defendants' contention. But it is manifest that some, at any rate, of the Judges doubted whether the original order had been properly made; Brett, L.J., saying (9 Ch.D. at p. 464): "It seems to me that no such order as this

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ought to be made unless the questions in the actions are substantially the same, and the evidence would be substantially the same if they were all tried."

This view is that now adopted in the case already cited, *Lee* v. *Arthur*, 100 L.T.R. 61, where the Master of the Rolls quotes the judgment in the case of *Corporation of Saltash* v. *Jackman* (1844), 1 D. & L. 851, and states that the Court "cannot compel one defendant against his wish to have his case tied up with those of defendants in other actions."

The same reasoning shews the impossibility of compelling a plaintiff to tie up his case with those of other plaintiffs, without his consent. *Westbrook* v. *Australian Royal Mail Steam Navigation Co.* (1853), 23 L.J.N.S. C.P. 42, is an illustration of this. Eight separate passengers, by the same attorney, brought separate actions for damages arising out of a breach of contract for passage, whereby the plaintiffs suffered in their health. Maule, J., said: "They have different grievances. Mr. Smith could not be said to have suffered in Mr. Brown's health."

Williams v. *Township of Raleigh*, 14 P.R. 50, affords another illustration. Several plaintiffs brought separate actions for injury to their several farms by certain drainage works; and it was held by Ferguson, J.—a Judge most familiar with the common law practice—that there could not be consolidation, in either the true or the modified sense of that expression.

The direction which has been given by the learned Master in Chambers, I think, satisfactorily meets the case. Manifestly, damages will have to be assessed in the different cases; and it would be most unfair to direct the trial of the individual claims to be delayed, when this would delay the recovery of final judgment. The circumstances prevent the imposition of the term invariably required: a stay will only be granted when the defendants consent to judgment—that is, a final judgment—in the event of their failing in the test action.

The appeal will be dismissed. Costs to the plaintiffs in any event.

Appeal dismissed.

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POWELL-REES Limited v. ANGLO-CANADIAN MORTGAGE CORPORATION.

(Decision No. 3.)

Ontario High Court, Riddell, J. June 19, 1912.

1. CORPORATIONS AND COMPANIES (§ IV A—41)—POWERS—IMPLIED—RIGHT TO SUE OR BE SUED—PLEAD OR BE IMPLEADED—CORPORATE NAME.

A corporation has certain powers necessarily and inseparably incident to it, and among them is the power to sue or to be sued, plead or be impleaded by its corporate name.

[See *Conservators of the River Tone* v. *Ash*, 10 B. & C. 349; and Blackstone's Commentaries, vol. 1, p. 475.]

2. CORPORATIONS AND COMPANIES (§ I E—192)—GOVERNMENTAL REGULATION—INCORPORATION OF LOAN COMPANY—RIGHT TO SUE OR BE SUED IN ITS CORPORATE NAME—CONDITION REQUIRING REGISTRATION—2 GEO. V. (ONT.) CH. 34; R.S.O. 1897, CH. 205.

A provision in the letters patent incorporating a loan company in Ontario, giving power to the company to sue and be sued by its corporate name only so long as it is registered under the Loan Corporations Act, R.S.O. 1897, ch. 205 (see now 2 Geo. V. (Ont.) ch. 34) is not justified by the Act, and is ineffectual.

[*Simmons* v. *"Liberal Opinion" (Limited)*, *Re Dunn*, 27 Times L.R. 278, distinguished.]

3. EXECUTION (§ II—20)—EXAMINATION OF OFFICERS OF CORPORATION—WHO MAY BE EXAMINED—CON. RULE. (ONT.) 1897, 902.

Ontario Con. Rule 902, providing that the officers of a corporation may be examined under a judgment against the corporation, includes all who have been such officers.

[*Société Générale de Commerce et de l'Industrie en France* v. *Johann Maria Farina & Co.*, [1904] 1 K.B. 794, followed.]

4. EXECUTION (§ II—20)—SUPPLEMENTARY PROCEEDINGS—"OFFICERS" OF A CORPORATION—DIRECTORS—CON. RULE. (ONT.) 1897, 902.

The word "officers" in Ontario Con. Rule 902, providing that the officers of a corporation may be examined under a judgment against the corporation, includes a director.

[*Société Générale de Commerce et de l'Industrie en France* v. *Johann Maria Farina & Co.*, [1904] 1 K.B. 794, referred to.]

5. EXECUTION (§ II—20)—SUPPLEMENTARY PROCEEDINGS—EXAMINATION OF PARTY INSTRUMENTAL IN THE ORGANIZATION OF COMPANY—"OFFICER"—CON. RULE (ONT.) 902.

One who has been mainly instrumental in obtaining letters patent incorporating a company in Ontario, and has twice been to England in connection with the company's affairs, and has been a director of the company and represented as the Canadian president, and purports and undertakes to act on behalf of the company, and does not deny that he knows all about its property, may be examined under a judgment against the company as an officer thereof, under Ontario Con. Rule 902.

Statement

THIS is an appeal by E. R. Reynolds, one of the provisional directors of the defendant company from the order of Cartwright, M.C., *Powell-Rees, Limited* v. *Anglo Canadian Mortgage Co.* (Decision No. 2), 3 D.L.R. 879, 3 O.W.N. 1375, 22 O.W.R. 295, ordering his examination, under Con. Rule 902,* as to the estate and means of paying the judgment obtained by the plaintiffs against the defendant company.

The judgment of the Master was varied.

*902. Where the judgment is against a corporation, the judgment creditor may in like manner examine any of the officers of such corporation, upon oath, before a Judge or other officer authorised to take an examination under Rule 900, touching the names and residences of the stockholders in the corporation, the amount and particulars of stock held or owned by each stockholder and the amount paid thereon, and as to what debts are owing to the said corporation, and as to the estate and effects of the corporation; and as to the disposal made by it of any property since contracting the debt or liability in respect of which the said judgment was obtained, or, in the case of a judgment for costs only, since the commencement of the cause or matter.

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John MacGregor, for the appellant.
M. C. Cameron, for the plaintiffs.

RIDDELL, J.:—On the 29th November, 1910, letters patent issued constituting E. R. Reynolds and five other persons named "and all such persons as are or shall at any time hereafter become shareholders in the loan company hereby created under the provisions of the said Act a body corporate and politic with a perpetual succession and a common seal by the name of 'The Anglo-Canadian Mortgage Corporation,' and (so long as the company stands duly registered in the terms of the said the Loan Corporations Act) capable of exercising all the functions of an incorporated company . . . Provided . . . that if the said company is not registered in terms of the said Act, and does not go into actual operation within two years after incorporation . . . such powers, except so far as necessary for winding up the company, shall *ipso facto* be forfeited . . . and . . . the charter of the said company may at any time be declared to be forfeited . . . by an order . . . in council . . ."

The letters patent set out, in the preamble: "Whereas by the statute . . . it is provided that the Lieutenant-Governor . . . in Council may, by letters patent, grant a charter of incorporation to such persons as pursuant to the Loan Corporations Act have duly constituted themselves a provisional loan corporation and have elected from amongst themselves six persons as provisional directors thereof. And whereas by petition . . . E. R. Reynolds" and the said five other persons named "provisional directors elected as hereinbefore mentioned have prayed that a charter may be granted to them . . ."

The charter was procured by Reynolds, who is a barrister, and it is of course issued under R.S.O. 1897, ch. 205, and amending Acts.

As the company was, by the charter, capable of exercising the functions of a loan company only so long as it should stand duly registered, and as it could not procure registration until $30,000 was paid into the company's treasury, and as this sum was not forthcoming, it was determined to advertise in England. Reynolds was over in England twice about it, and identifies an advertisement which contains a list of directors in Canada, amongst them E. R. Reynolds, Barrister-at Law, Toronto (President). There are four others named as directors in Canada, no one of them being named in the charter. As sec. 6 of the Act makes the provisional directors named in the declaration for incorporation *ipso facto* the first directors of the corporation, there must have been deliberate deceit in the English advertisement, or more has occurred in the way of "organising" the company than has been made to appear.

The advertisement does not seem to have been very successful, although it represents the company as "Incorporated by Letters Patent under the Loan Corporations Act of the Province of Ontario," etc., and sets out as directors in the United Kingdom one K.C.M.G., one Right Honourable Deputy-Lieutenant, and another gentleman, a director in a well-known insurance company.

Worse still, the advertising agents, the present plaintiffs, were not paid; and they sued the company in the English Courts and got judgment for over $15,000 in February, 1912. Then they sued in Ontario upon this English judgment, and in March got judgment here for $15,696.46 and $19.60 costs. One proceeding in this action will be found reported, *Powell-Rees, Limited* v. *Anglo-Canadian Mortgage Co.* (Decision No. 1.), 1 D.L.R. 920, 3 O.W.N. 844. The plaintiffs, as judgment creditors, then applied under Con. Rule 902 for an order to examine Reynolds as to the estate and means of the debtor, etc., etc. The Master in Chambers on the 8th June made an order accordingly [See *Powell-Rees Limited* v. *Anglo-Canadian Mortgage Co.* (Decision No. 2.), 3 D.L.R. 879, 3 O.W.N. 1375, 22 O.W.R. 295.]

Reynolds now appeals.

What possible honest purpose can be served by refusing full disclosure about the affairs of this company, I have not been told, nor am I able to discover—but that is not the question I am to determine.

The main objection taken to this examination is, that the company is non-existent as a company, and the judgment is a nullity—it is to be noted that it is not the company which raises that objection, but Reynolds, who pretended to be its president when he was seeking money for it in England.

But there was a body corporate formed by the letters patent—none the less a body corporate because it was not to exercise the functions of a loan company until it was registered. A corporation has certain powers "necessarily and inseparably incident to every corporation;" and among them is the power "to sue or be sued, implead or be impleaded . . . by its corporate name:" Blackstone, vol. 1, p. 475; *cf. Conservators of the River Tone* v. *Ash* (1829), 10 B. & C. 349; *S.C.*, 8 L.J. K.B. O.S. 226. Of course, the paramount power of the Legislature may intervene and direct all actions for or against a corporation to be brought in some other name, as was the case, for example, in *Marsh* v. *Astoria Lodge* (1862), 27 Ill. 421; but there is nothing of that kind here.

The provision in the charter which apparently gives the power to sue and be sued by its corporate name only so long as the company is registered, is not justified by the Act, and is wholly unnecessary. The power exists without any such provision; and, granted incorporation which is effective by the statute, there is no power to limit the effects of the same by a provision in the

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letters patent. It would be absurd, in my view, that, for example, the company could not, in its own name, sue a director or agent who had received a large sum of money on behalf of the company. There is nothing in this objection on principle. Nor does the case of *Simmons* v. *"Liberal Opinion" (Limited), Re Dunn* (1911), 27 Times L.R. 278, help: there there was no company, no corporation at all by that name: see *per* the Master of the Rolls, at p. 279, col. 2—"a non-existing corporation."

The other point is as to the position of Reynolds.

Under Con. Rule 902, the officers of a company may be examined, and this includes those who have been such officers: *Société Générale du Commerce et de l'Industrie en France* v. *Johann Maria Farina & Co.*, [1904] 1 K.B. 794.

Under Con. Rule 903, "any clerk or employee or former clerk or employee of the judgment debtor" may be examined; but such an examination requires an order.

The word "officer" is ambiguous—the meaning may and often does depend upon the context. Perhaps the strongest argument in favour of the appeal is to be found in sec. 94 of the Loan Corporations Act, R.S.O. 1897, ch. 205, directing the *directors* to appoint *officers*.

But, for the purposes of Con. Rule 902, that "officer" includes "director" is beyond doubt. In the case already referred to, in [1904] 1 K.B., a judgment had been recovered against a company, and an application was made under O. XLII., r. 32, for a person who had been a director of the company, but had ceased to be such, to attend to be examined as to the debts, etc. The difference between the English Rule and ours is pointed out in Holmested and Langton's Judicature Act, 3rd ed., p. 1138—and for the purpose of this case the difference is not of consequence.

It had already been said in *Attorney-General* v. *North Metropolitan Tramways Co.*, [1892] 3 Ch. 70, at p. 74, by North, J., that, in an inquiry of a somewhat different character, "*primâ facie* the secretary is the best person" to interrogate. "But," he adds, "I quite admit that they are entitled to have information from such persons as can best give it with respect to the matters which are the proper subject for the interrogatories." Under the particular case he thought the traffic manager was not the proper person for the purpose: see also *Chaddock* v. *British South Africa Co.*, [1896] 2 Q.B. 153. In the case in [1904] 1 K.B. [*Société Générale* v. *Farina*, [1904] 1 K.B. 794] a person had been a director of the defendant company, but had ceased to be such. He disputed the right to examine him, on that ground. The Judge of first instance and the Court of Appeal both took it for granted that a director was an officer for the purpose of this Rule, and directed the witness to attend at his own expense to be examined.

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In the present case, Reynolds was the person to take out the charter; he went to England twice in connection with the company's affairs; he was a director, who represented himself—or at least was represented—as the Canadian president; it is sworn and not denied that he purports and undertakes to act on behalf of the company, and within a few days back has stated that he was entering into a contract for the sale of the capital stock of the company; that he cabled instructions a few months ago to England either to pay the account in judgment in this action or to send the proceeds of the sale in England of the shares in the company's stock—he does not deny that he knows all about the property of the company—but contents himself with swearing that he never held himself out to the plaintiffs' solicitor as president of the company, and that, as the company was not licensed, it could have no president or officer. I presume that he was swearing or intending to swear to his opinion—if so, it were better left unsaid.

It is plain that Reynolds is a proper officer to examine under Con. Rule 902; and, had his objection been that no order was necessary for his examination, I think I should have given effect to such an objection—but his objection was not at all to the practice but to the right to examine him at all. It is not beyond the powers of the Court to order a subpœna to issue for service on an officer for examination under Con. Rule 902, however unnecessary such an order may be. The formal order of the Master in Chambers has not been drawn up—the proper order to make is that a subpœna (*duces tecum*, if desired) issue for the examination of Reynolds under Con. Rule 902. There will be no costs of the unnecessary application before the Master—Reynolds will pay the costs of the appeal forthwith after taxation thereof.

Order varied.

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Aug. 21.

Manitoba King's Bench. Trial before Mathers, C.J.K.B. August 21, 1912.

1. PLEADING (§ I N—114)—AMENDMENT ON THE TRIAL—DEFENDANT PLEADING ESTOPPEL BY JUDGMENT—ERECTION OF GAS WORKS—MUNICIPAL BY-LAWS—PRIOR JUDGMENT.

In an action by a city in its own right and by the Attorney-General on the relation of the city and its building inspector against an electric railway company to restrain the breaches of certain city by-laws concerning the erection of buildings and any gas works or gas holders within the city, in which action the company claimed that by virtue of the powers derived from another company it was not subject to the by-laws and also denied the validity of the by-laws, and at the opening of the trial applied to amend its defence by pleading that the plaintiffs, by the judgment of the Privy Council in the company's favour in a former action which the city alone brought against the company and in which the issues were similar to those in the present action, were estopped from denying that the company possessed all the powers of its predecessor, the amendment was allowed as against the city and an opportunity given the company of proving it.

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2. JUDGMENT (§ II E 2—163)—ACTION BY ATTORNEY-GENERAL ON RELATION OF A MUNICIPALITY AND ITS BUILDING INSPECTOR AND BY MUNICIPALITY ITSELF—PLEADINGS—AMENDMENT ON TRIAL—JUDGMENT IN FORMER ACTION BY MUNICIPALITY ALONE.

In an action by the Attorney-General on the relation of a city and its building inspector and by the city in its own right against an electric railway company to restrain the breaches of certain city by-laws concerning the erection of buildings and of any gas works or gas holders within the city, in which action the company claimed that by virtue of the powers derived from another company that it was not subject to the by-laws and also denied their validity, and at the opening of the trial applied to amend its defence by pleading that the plaintiffs, by the judgment of the Privy Council in the company's favour in a former action which the city alone brought against the company and in which the issues were similar to those in the present action, were estopped from denying that the latter possessed all the powers of its predecessor, the Attorney-General is not estopped by the judgment in the former action and as against him the application to amend should be refused.

[*St. Mary Magdalene* v. *Attorney-General*, 6 H.L.C. 189; *People* v. *Halladay*, 93 Cal. 241, 29 Pac. R. 54, writ of error dismissed, 159 U.S. 415, distinguished.]

3. PARTIES (§ I—48)—ATTORNEY-GENERAL BRINGING ACTION ON RELATION OF MUNICIPALITY AND AN OFFICER THEREOF—INDEPENDENT RIGHTS—CONCLUSIVENESS OF PRIOR JUDGMENT WHERE MUNICIPALITY SUED ALONE.

The Attorney-General, suing on the relation of a city and an officer thereof, if he has independent rights in the action, is not bound by the proceedings in a former action by the city against the same defendant in which similar issues were involved and the judgment was rendered against the city, upon the ground that such officer represents the Crown alone and could have sued without a relator as well, there being no difference except for the purpose of costs between an *ex officio* information and an information on the relation of a corporation or a private person.

[*Attorney-General* v. *Logan*, [1891] 2 Q.B. 100, *per* Vaughan Williams, J.; *Attorney-General* v. *Cockermouth*, L.R. 18 Eq. Cas. 172, *per* Jessel, M.R., at p. 176, specially referred to; *Fonseca* v. *Attorney-General*, 17 Can. S.C.R. 612 (reversing, on other grounds, *Attorney-General* v. *Fonseca*, 5 Man. L.R. 173), at p. 619, distinguished.]

4. ATTORNEY-GENERAL (§ I—1)—PROTECTION OF PUBLIC RIGHTS—RIGHT TO BRING ACTION—BREACH OF CITY BY-LAWS—GAS WORKS AND HOLDERS.

The only party who can sue for the protection of the public right is the Attorney-General of the province in an action to restrain the breach of three city by-laws one of which forbade the erection of any gas works or gas holders within the city without first obtaining the permission of the city council, another prohibiting the erection of buildings within the city without a permit from the building inspector, and the third prescribing an area within the city within which no gas works should be erected or continued.

[*Devonport* v. *Tozer*, [1903] 1 Ch. 759; *Attorney-General* v. *Wimbledon*, [1904] 2 Ch. 34; and *Attorney-General* v. *Pontypridd*, [1908] 1 Ch. 388, referred to.]

5. ATTORNEY-GENERAL (§ I—1)—RIGHT TO BRING ACTION—BREACH OF MUNICIPAL BY-LAW—EFFECT OF MUNICIPALITY'S CONSENT TO BREACH.

The right of the Attorney-General to take action on behalf of the public for the violation by an electric railway company of a by-law forbidding the erection of gas holders within the city without first

obtaining the permission of the city council, cannot be taken away by the city consenting to the erection of a gas holder by a company in breach of the city's own by-law.

[*Yabbicom* v. *King*, [1899] 1 Q.B. 444, followed.]

6. MUNICIPAL CORPORATIONS (§ II C 3—99)—LEGISLATIVE FUNCTIONS—BY-LAWS FORBIDDING ERECTION OF GAS WORKS OR HOLDERS—PERMIT OF CITY COUNCIL—BUILDING RESTRICTIONS—PRESCRIBED AREA.

Three city by-laws, one of which forbade the erection of any gas works or gas holders within the city without first obtaining the permission of the city council, another prohibiting the erection of buildings within the city without a permit from the building inspector, and the third prescribing an area within the city within which no gas works should be erected or continued, have within the territorial limits of the city the same effect as an Act of Parliament has upon the subjects at large.

[*Hopkins* v. *Swansea*, 4 M. & W. 621, *per* Lord Abinger, C.B., at p. 640, followed; *Yabbicom* v. *King*, [1899] 1 Q.B. 444, *per* Day, J., at p. 448; Dillon on Municipal Corporations, par. 573; Biggar's Municipal Manual 327, referred to.]

7. PLEADING (§ I N—111)—AMENDMENT—COMPENSATION IN COSTS.

No admissible amendment to pleading material to the case of the party applying therefor should be refused unless the opposite party cannot be compensated by costs.

8. PLEADING (§ I N—111)—AMENDMENT—GROUND OF ACTION OR DEFENCE.

An application to amend a pleading should be refused if the matter proposed to be pleaded would constitute no ground of action or defence as against the other side.

9. PLEADING (§ I N—114)—AMENDMENT AT CLOSE OF TRIAL—TRUTH OF ALLEGATION SOUGHT TO BE INTRODUCED NOT CONFIRMED BY EVIDENCE.

An application to amend a pleading should be refused where the application is made at the conclusion of the evidence and the truth of the allegations sought to be introduced is not borne out by the evidence.

10. JUDGMENT (§ II A—63)—RES JUDICATA—DECISION OF COURT OF COMPETENT JURISDICTION.

Before a matter can be considered *res judicata* it must have been determined by the judgment of a court of competent jurisdiction.

Statement

THE defendants at the opening of the trial applied to amend their defence by pleading that the plaintiffs are estopped by the judgment in a former action, *Winnipeg Electric R. Co.* v. *The City of Winnipeg*, 4 D.L.R. 116, [1912] A.C. 355, brought by the city of Winnipeg alone against these defendants from denying that the defendants possess all the powers of the Manitoba Electric and Gas Light Company. The application was opposed by both the Attorney-General and the city.

The motion to amend was refused.

I. Pitblado, K.C., for the Attorney-General.

A. J. Andrews, K.C., and *T. A. Hunt*, for city of Winnipeg.

J. H. Munson, K.C., *E. Anderson*, K.C., and *D. H. Laird*, for defendants.

Mathers, C.J.

MATHERS, C.J.K.B.:—I deferred deciding the question until I had heard the evidence, permitting the defendants in the

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meantime to adduce evidence as though the amendment had been allowed. At the close of the evidence the defendants' counsel renewed the motion, and after hearing argument for and against, I reserved the point for further consideration.

The rule of practice applicable to amendments is well settled. No admissible amendment material to the case of the party applying ought to be refused unless the opposite party cannot be compensated by costs. I say admissible amendment because if the matter proposed to be pleaded would constitute no ground of action or defence as against the other side, or where the application is made at the conclusion of the evidence, the truth of the allegations sought to be introduced is not borne out by the evidence, the application should be refused.

In the present case counsel for the Attorney-General opposes the motion on both the grounds above stated. Counsel for the city confined his argument chiefly to the point that the evidence proposed in support of the proposed new plea does not prove it.

The action is brought by the Attorney-General by relation of the city of Winnipeg and E. H. Rodgers, the city's building inspector, and by the city of Winnipeg in its own right.

The statement of claim sets up three by-laws passed by the city, one of which forbade the erection of any gas works or gas holders within the city without first obtaining the permission of the city council; another which prohibits the erection of buildings within the city without a permit being issued therefor by the building inspector, and a third which prescribed an area within the city within which no gas works shall be erected or continued.

It further alleges that the defendants have started to erect and are erecting gas works within the city without having any legal right or power to do so, without having first obtained the permission of the city council, without a permit and within the prohibited area, thus contravening the provisions of all the by-laws.

The defendants deny the validity of the several by-laws relied upon by the plaintiffs. They also claim that by virtue of the powers derived from the Manitoba Electric and Gas Light Company they are not subject to these by-laws. They also set up numerous facts and circumstances for the purpose of shewing that the plaintiffs are estopped in fact from denying that the defendants have these powers.

In addition to this they desire by amendment to set up that the question of their having these powers is *res judicata* because of the judgment of the Privy Council in a former action which the city of Winnipeg alone brought against the defendants for, amongst other relief, a declaration (1) that the defendants had no right to use any electric power for the operation of their street railway in the city except what is developed within the

limits of the city; (2) that the defendants had no right to erect poles or wires on the streets, lanes or highways of the city for the purpose of transmitting electric power developed outside the city, and (3) that the defendants might be bound to forthwith remove the poles and wires erected by them and restrained from erecting others for such purpose.

The defendants in that action by their defence alleged a transfer to themselves of all the franchises, rights, powers, assets and plant of the Manitoba Electric and Gas Light Company in 1898, and that they had since continued to exercise the rights and franchises so transferred with the consent and approval of the city.

By the final judgment of the Privy Council the city's claim was dismissed upon all points.

Before a matter can be considered *res judicata* it must have been determined by the judgment of a Court of competent jurisdiction. Like most other rules of law the chief difficulty does not consist in its statement, but in its application. In this case the central difficulty is in ascertaining whether or not any particular question has been determined by the judgment.

The cases are not altogether clear or consistent as to what may be looked at for the purpose of solving this question.

I do not propose on this application to go into the question of what may or may not be evidence in support of a plea which on its face appears to be sufficient in law. The defendants' counsel produced a bulky printed volume of the proceedings before the Privy Council which he says contains evidence to prove the proposed plea. The plaintiffs' counsel deny that it contains such evidence. I do not feel called upon at this stage to critically examine this evidence. As against the city of Winnipeg, which was a party to the other action, I will allow the amendment and give the defendants an opportunity of proving it if they can.

The position of the Attorney-General is entirely different. He was not a party to the former action, and if in this suit he has any independent rights he is not bound by the proceedings in the former action. The fact that he sues at the relation of the city makes not a particle of difference. He represents the Crown and the Crown alone and could have sued without a relator as well as with one. In that case costs might be given against the Attorney-General, rule 284. When the Attorney-General sues by a relator the practice is to give costs against the relator and not against the Attorney-General. It would seem that the object in having a relator is for the protection of the Crown against costs and not for the protection of the defendant. The practice in such cases is lucidly stated by Vaughan Williams, L.J., in *Attorney-General* v. *Logan*, [1891] 2 Q.B. 100. He there says:—

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As I understand the practice when the Attorney-General proceeds at the relation of a private person or a corporation he takes the proceedings as representing the Crown and the Crown through the Attorney-General is really a party to the litigation. It is quite true that when the proceeding is taken at the relation of a subject, the practice is to insert his name in the proceedings as relator and to make him responsible for the costs, but I do not think that this practice in any sense makes the relator a party to the proceedings, although he is responsible for the costs, any more than (to take a converse case) an infant who brings an action is responsible for the costs of it. If I am right it would seem that the practice of making the relator directly responsible for the costs of the action had its origin not in the protection of the defendant but of the Crown.

In *Attorney-General* v. *Cockermouth*, L.R. 18 Eq. Cas. 172, at 176, Jessel, M.R., said:—

> Except for the purposes of costs there is no difference between an *ex officio* information and an information at the relation of a private individual. In both cases the Sovereign as *parens patriae* sues by the Attorney-General.

The action is to restrain the breach of city by-laws by the defendants, and for the abatement of what is alleged to be a public nuisance. These by-laws have within the territorial limits of the city the same effect as an Act of Parliament has upon the subjects at large: *per* Lord Abinger, C.B., in *Hopkins* v. *Swansea*, 4 M. & W. 621, at 640; Dillon on Municipal Corporations, par. 573; Biggar's Municipal Manual, 327, and *per* Day, J., in *Yabbicom* v. *King*, [1899] 1 Q.B. 444, at 448.

That in such a case as this the only party who can sue for the protection of the public right is the Attorney-General is sufficiently shewn from such cases as *Devonport* v. *Tozer*, [1903] 1 Ch. 759; *Attorney-General* v. *Wimbledon*, [1904] 2 Ch. 34, and *Attorney-General* v. *Pontypridd*, [1908] 1 Ch. 388.

The right of the Attorney-General to take action on behalf of the public could not be taken away by the city consenting to the erection of this gas holder by the defendants on breach of its own by-laws: *Yabbicom* v. *King*, [1899] 1 Q.B. 444.

Mr. Munson for the defendants relied principally upon two cases as shewing that the Attorney-General is estopped by the former judgment, both of which I think are quite distinguishable. The first case relied upon is *College of St. Mary Magdalene* v. *Attorney-General*, 6 H.L.C. 189. That was not a case of *res judicata*. It was a case of the Statute of Limitations, but the principle is probably the same. The facts were these: Lands were given for the benefit of the poor of two parishes and placed under the control of the rectors and church wardens, who, with the consent of the vestries, might lease them. They executed a lease of them forever to a college. About 60 years after, the Attorney-General filed an information to cancel the lease. The

Court held that as the real plaintiffs were the poor of the two parishes, they were in the situation of a *cestui que trust*; that as the Attorney-General had no independent right it was a suit by them; that they could not maintain such suit, unless against their trustees, except within 20 years, that this was not such a suit but one against purchasers for value and was barred.

The Lord Chancellor, (*St. Mary Magdalene* v. *Attorney-General*, 6 H.L.C. 189, at 210) said:—

> The Attorney-General is only a part of the machinery by which the rights of others are sought to be enforced. He is no more a party claiming a right than in an ordinary action at law the attorney on the record is such a person. We must look at the real litigants in this case and not at those by whose intervention the rights in dispute are endeavoured to be sustained. But here I feel bound to say I differ from the Master of the Rolls. The parties really seeking relief in this suit are the poor of the two parishes of St. Olave and St. John.

Lord Wensleydale (*St. Mary Magdalene* v. *Attorney-General*, 6 H.L.C. 189, at 214) said he would not enquire whether the Attorney-General was a necessary party, "for if he was it seems to me clear that he is only an instrument to enforce the rights of those who are entitled to the benefit of the charity and stands in the same situation as they do with respect to those rights; and if the claimants on whose behalf he is suing are barred he must also be barred. He has no independent title of his own; he must succeed or fail as they are entitled to succeed or fail, and if the Statute of Limitations is a bar to them it is a bar to the Attorney-General."

That is a very different case from the present one. The Attorney-General represented only the private rights of the poor of the two parishes, a vastly different thing from suing for the benefit of the public at large. Those whose interests were affected may have been numerous, but were nevertheless capable of exact ascertainment. There seems no good reason as suggested by Lord Wensleydale why some of them, as representing themselves and all others entitled, could not have sued without the intervention of the Attorney-General at all.

The other case relied upon is a United States case of *People* v. *Halladay*, 29 Pac. R. 54. The action was by the Attorney-General of the State as representing the people. By an Act of Congress the title of the United States to certain lands known as Lafayette Park was granted to the city and county of San Francisco. In a former action brought by Halladay against the city and county of San Francisco to quiet his title to this same land, the question litigated was whether the lands in question had ever been dedicated to the public use as a park. The judgment was that Halladay was the owner of an undivided nineteen-twentieths interest in the land and his title thereto was

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quieted as against the city and county. The Attorney-General afterwards instituted the present action and alleged that the land was lawfully dedicated to the public use as a public square as Lafayette Park, and that the defendants who were plaintiffs in the former action had erected buildings and fences thereon thereby obstructing the public use and that such buildings, etc., constituted a nuisance. The defendant pleaded that the question of dedication was *res judicata* by the judgment in the former action. The Court held the defence good and that the Attorney-General although not a party to the former action was bound by the judgment.

That case at first blush appears to be a strong one in the defendants' favour, and although not binding in this Court, is entitled to respect. A consideration of the reasons for the conclusion arrived at will, however, at once shew that it proceeded upon a principle of law that has no application in England or Canada. The ground of the judgment was that in such an action the municipality represented the public in the same way as the Attorney-General does in England and Canada. That this was the ground of the decision the following quotation from the reasons for judgment will shew:—

> The city and county of San Francisco is a municipal corporation created by the Legislature of the State and has conferred upon it by the State full power and jurisdiction over the public squares within its territorial limits, with the right to sue and be sued, and this necessarily includes the authority to maintain and defend all actions relating to its right to exercise control over and subject to the public use such squares or land claimed by it to have been dedicated for such purposes, and in any action brought by it for the purpose of vindicating and protecting the public rights in such squares or land claimed as such the State would be bound by the result, because in such action the city and county would in fact represent the people of the State by virtue of its authority to maintain such actions for the purpose of preserving the public rights of which it is the trustee. A municipal corporation is for many purposes but a department of the State organized for the more convenient administration of certain powers belonging to the State [cites cases], and such corporations in their management and control over streets and squares within their limits and in actions for the vindication and preservation of the public rights therein exercise a part of the sovereignty of the State.

Cases are then cited wherein it was held that a city has the same right to maintain an action to prevent an unlawful obstruction of the streets as the people of the State; that the State has the same power as the Crown in England over streets, highways and public grounds; that the State has vested cities, etc., with control over highways and streets, and they are invested with the authority of the Crown and the State in this respect to file bills to prevent and remove obstructions; that the municipality so far represents the equitable rights of the inhabitants that

it may maintain actions to abate public nuisances upon a public square, and then proceeds:—

> We entertain no doubt that the city and county of San Francisco has the authority to maintain an action for the purpose of preserving the rights of the general public to the use of squares or land claimed as such within its limits and that in such action it is authorized to put in issue the alleged rights of the people to such easement and that the State itself is bound by the result of such litigation if the same is not collusive.

The short ground of the decision was that the city in California for the purpose of the action represented the people not only of the city but of the State. A municipality in Canada has no such representative capacity, so that *People* v. *Halladay*, 93 Cal. 241, even if binding, is for that reason distinguishable.

In the *Attorney-General* v. *Fonseca*, 17 Can. S.C.R. 612, reversing 5 Man. L.R. 173, there is a dictum of Gwynne, J., at 619, that the Government of Canada would be bound by the judgment in a previous action to which the Attorney-General was a party. In the present case the Attorney-General was not a party to the former action, so that that case need not be further noticed.

For these reasons, I am of opinion that the Attorney-General is not estopped by the judgment in the former action and that as against him the application to amend should be refused.

Motion to amend refused.

THE CANADIAN BANK OF COMMERCE v. COLWELL.

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Nova Scotia Supreme Court, Sir Charles Townshend, C.J., and Russell and Drysdale, JJ. January 22, 1912.

1. APPEAL (§ VII I 1—346)—APPLICATION TO JUDGE TO REVIEW TAXATION OF COSTS—EXCESSIVE AMOUNT.

The court will not review a taxation of costs by a judge of the County Court even where the amount allowed appeared to be excessive unless the judge has first been applied to to review his taxation and has refused to do so.

Statement

APPEAL from the taxation of plaintiff's costs by MacGillivray, C.C.J.

The appeal was dismissed with costs.

The action was brought on a bill of exchange for the sum of $315. After the issue of the writ, but before service, defendant, by cheque, paid the amount of plaintiff's claim, less a small amount in dispute. Plaintiff proceeded for the balance claimed and recovered judgment for $2.25, upon which costs were taxed and allowed at the sum of $77.65. On the appeal defendant sought to have the following items and parts of items reduced, struck out and taxed:—

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	Off.
Writ and copy reduced from $3.00 to $1.20	$1.80
Instructions for statement of claim $2.00 to $1.50	.50
Statement of claim and copies, $3.00 to $1.50	1.50
Attendance to file, 25c.	.25
Service by letter, 30c.	.30
Reply and copies from $2.00 to $1.00	1.00
Service by letter, 30c.	.30
Attendance to serve, 25c.	.25
Attendance to have certified, 25c.	.25
Attendance to issue order for judgment, $1.50	1.50
Attendance to seal and file, 25c.	.25
Attendance to serve, 25c.	.25
Brief in cause reduced from $15.00 to $7.50	7.50
Counsel fee reduced from $25.00 to $10.00	15.00
Postage reduced from $1.00 to 25c.	.75
Fee for agent, $1.50, to be struck out	1.50
	$32.90

W. F. O'Connor, K.C., for appellant.
R. R. Griffin, for respondent.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—We received a memorandum of cases from Mr. O'Connor in this case after the close of the argument and the following morning announced our decision that the appeal could not prevail. I wish to add that after reading over Mr. O'Connor's memorandum our opinion has not in any way been changed.

One certain ground is that this Court could not review the taxation unless he had first applied to have the taxation of costs reviewed by the Judge of the County Court. The statute only permits an appeal after a refusal on the part of the Judge to meet his views.

I wish to add, further, that we are all of the opinion that the Judge of the County Court taxed a most exorbitant bill, and we hope if the bill is again presented to him the remarks I am now making on behalf of the Court will be considered by him.

In view of the facts stated the order will go dismissing the appeal without costs.

Appeal dismissed without costs.

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Sept. 24.

Alberta Supreme Court, Beck, J., in Chambers. September 24, 1912.

1. COURTS (§ I A—2)—JURISDICTION—INHERENT POWER—RIGHT TO GRANT INTERIM ALIMONY.

The Supreme Court of Alberta has inherent jurisdiction to grant interim alimony.

[The Supreme Court Act, 1907, Alta., ch. 3, sec. 16, Browne and Powles, Divorce Law and Practice, 7th ed., p. 137 and Halsbury's Laws of England, vol. 16, p. 516, specially referred to.]

2. DIVORCE AND SEPARATION (§ V B—50)—ALIMONY—INTERIM ALLOWANCE —AMOUNT.

Where a wife without any means and unable to earn anything on account of the state of her health is entitled to interim alimony, an allowance of eight dollars per week as such is reasonable, notwithstanding that her husband asserts on oath that he is not the owner of any property within the province.

Statement

THIS is an application for interim alimony.

The application was granted.

A. L. Marks, for plaintiff.

C. C. McCaul, for defendant.

Beck, J.

BECK, J.:—Mr. McCaul raised the question whether the Court has jurisdiction to grant interim alimony.

The Supreme Court Act 1907, Alberta, ch. 3, confers power on the Court to grant alimony in certain cases (sec. 16).

In England the granting of alimony *pendente lite* was the settled practice of the Ecclesiastical Courts. It seems as far as I can ascertain to have depended not upon statute, but solely upon the practice of the Court to give, as the Court of Chancery was accustomed to do in a variety of cases, partial relief pending the ultimate decision of the cause, *e.g.*, interim injunctions, interim receivers.

In 1857 the Ecclesiastical Courts disappeared and then jurisdiction was transferred to the Divorce Court.

In Browne & Powles, Divorce Law and Practice, 7th ed., p. 137 it is said: "The power thus derived by inference of making provision for a wife in these suits (*i.e.*, by way of alimony *pendente lite*) is that of the Ecclesiastical Courts only." In Halsbury's Laws of England, vol. 16, "Husband and Wife," p. 516, it is said: "In accordance with the ecclesiastical practice a wife may in any cause file a petition for alimony pending suit."

The power to give relief *pendente lite* seems to have been exercised originally without statutory authority, both in the Ecclesiastical Court and the Court of Chancery.

Under exactly similar statutory provision the Court of Chancery of Upper Canada and Ontario and the Supreme Court of Judicature of that province have for many years assumed the power to grant interim alimony; as also did the Supreme Court

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of the North-West Territories and this Court—in some sense, the successor of the Territorial Court—has done so, as, of course, since its creation in 1907. I think all these Courts rightly assumed the jurisdiction.

An order for interim alimony will go.

If the plaintiff by the statement of claim or by concurrent notice has asked for interim alimony, it will run from the date of the statement of claim or notice; if not, from the date of the order. It appears that the plaintiff is without means and that owing to her state of health she is unable to earn anything. She asks an allowance of $8 a week. This amount seems reasonable. I fix the interim alimony at that amount and order the defendant to pay it, although he swears he is not the owner of any property in Alberta. As in this jurisdiction there is no imprisonment for debt or for disobedience to an order merely to pay money, defendant's assertion is no reason for my refraining from making the order. The costs will be costs in the cause.

Application granted.

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Re MacCULLOUGH and GRAHAM.

Alberta Supreme Court, Walsh, J., in Chambers. May 15, 1912.

1. LAND TITLES (TORRENS SYSTEM) (§ IV—41)—CAVEATS—WHO MAY FILE—PARTNER CLAIMING INTEREST IN LAND BELONGING TO CO-PARTNERS—ABSENCE OF WRITING.

Section 84 of the Land Titles Act, 6 Edw. VII. (Alta.) ch. 24, providing among other things that any person claiming to be interested under certain instruments specifically mentioned, "or otherwise howsoever in any land," may cause to be filed with the registrar a caveat against the registration of any person as transferee does not restrict the registration of a caveat only to claims founded upon some written document, and the words "or otherwise howsoever" in the section aforesaid which follow the descriptions of interests which may be protected by the recording of caveat are broad enough to cover a claim by a member of a partnership composed of himself and the owners of certain land in which he claimed an interest in as an asset of the partnership, though the partnership was not evidenced by any writing.

2. PARTNERSHIP (§ IV—16)—PARTNERSHIP REAL ESTATE—ABSENCE OF WRITTEN PARTNERSHIP ARTICLES—RIGHT OF MEMBER TO FILE CAVEAT AGAINST LAND OWNED BY CO-PARTNERS.

If a caveator succeeds in establishing his contention that a valid partnership which was not evidenced by any writing subsisted between him and the owners of the land in question and that such land was an asset of that partnership and that he still retained his interest in the same, he would be entitled to a declaration by the Court to protect that interest by the recording of a caveat.

3. LAND TITLES (TORRENS SYSTEM) (§ VII—70)—PROCEDURE—CAVEAT FILED BY MEMBER OF PARTNERSHIP AGAINST LAND OWNED BY HIS CO-PARTNERS—CONDITIONS.

Where an application by the registered owners of certain land for an order vacating the registration of a caveat against it which ap-

plication was refused upon the hearing and instead the Court, upon the ground that the owners' title should not remain subject to the caveat for any longer time than was actually necessary, ordered the caveator to commence an action to establish his claim to set it down for trial at the sitting of the next month following that in which the order was given and to proceed to trial at such sittings and further directed that if the caveator made default in complying with this order in any respect, the owners might apply *ex parte* for an order for the removal of the caveat which would be granted by the Court upon satisfactory proof of such default.

4. COSTS (§ I—19c)—LAND TITLES PROCEDURE—ACTION TO ESTABLISH CLAIM—CONDITIONS IMPOSED.

Where the application by the registered owners of land for an order vacating the registration of a caveat against it was denied and instead an order was made directing the caveator to bring an action to establish his claim against the land, the costs of the application will be costs in the cause if the action is brought, and, if, through the default of the caveator the action is not brought or is dismissed for his default in proceeding to trial as directed by the order, the costs of the application will be to the owners.

APPLICATION by the registered owners for an order vacating the registration of a caveat against their land. Statement

The application was refused, though an order was made that the caveator should commence an action to establish his claim that the land against which his caveat was registered is an asset of a partnership of which he and the owner were members.

H. P. O. Savary, for the applicants.

W. W. Waters, for the caveator.

WALSH, J.:—The claim of the caveator is based upon his contention that the land in question is an asset of the partnership of which he and the owners are members. The partnership alleged is not in writing; the only written evidence of it submitted to me being a statement of the profits of the partnership in which the names of the owners and the caveator appear as constituting the partnership. Walsh, J.

Mr. Savary, for the owners, contends that this is not such an interest in land as justified the recording of this caveat; his contention being that sec. 84 of the Land Titles Act* permits of the registration of a caveat only when the claim of the caveator is founded upon some written document.

*Section 84 of the Land Titles Act, 6 Edw. VII. (Alta.) ch. 24, provides:—

Any person claiming to be interested under any will, settlement or trust deed, or any instrument of transfer or transmission or under an unregistered instrument or under an execution where the execution creditor seeks to affect land in which the execution debtor is interested beneficially but the title to which is registered in the name of some other person or otherwise howsoever in any land, mortgage or encumbrance, may cause to be filed on his behalf with the registrar a caveat in form "W" in the schedule to this Act against the registration of any person as transferee or owner of, or of any instrument affecting such estate or interest, unless such instrument be expressed to be subject to the claim of caveator.

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I do not so read this section. I think the words "or otherwise howsoever," which follow the description of interests which may be protected by the recording of a caveat, are broad enough to cover such a claim as this, and are not restricted in their application to a claim which is evidenced by some instrument or document in writing.

If the caveator succeeds in establishing his contention that a valid partnership subsisted between him and the owners, and that the land in question was an asset of that partnership, and that he still retains his interest in the same, I should think it quite clear that he would be entitled to a declaration to protect that interest by the recording of a caveat.

No order will be made on this application, therefore, for the removal of the caveat.

I think, however, that the plaintiffs' title should not remain subject to this caveat for any longer time than is actually necessary. I direct, therefore, that the caveator commence an action to establish his claim and that he serve his writ and statement of claim, either personally upon the defendants or upon their solicitors, Nichols & Savary, within five days after service of this order on his solicitors, Lathwell & Waters. I direct that this action be set down for trial by the plaintiff at the June sittings at Calgary, and that the same proceed to trial at such sittings, unless the same is delayed through the act or default of the owners or by consent of all parties or by order of a Judge. If the caveator makes default in compliance with this order in either of these respects, the owners may apply *ex parte* for an order for the removal of the caveat, which will be granted by me upon satisfactory proof of such default.

The costs of this application will be costs in the cause, if the action is brought. If, through the default of the caveator, the action is not brought or is dismissed for his default in proceeding to trial with it in accordance with this direction, the costs of this application will be to the owners.

Order accordingly.

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LENNOX v. GOOLD, SHAPLEY & MUIR CO. Ltd.

Saskatchewan Supreme Court, Wetmore, C.J. August 22, 1912.

1. SALE (§ II A—26)—WARRANTY—SALE OF ENGINE—DIFFERENCE BETWEEN WARRANTIES ON ORDER AND CONTRACT ENTERED INTO—ABSENCE OF FRAUD.

Where a traction engine was sold upon the order of the buyer and upon the receipt thereof the seller shipped the engine and the order contained the warranties of the seller on its face and the seller's agent, without any knowledge on the part of his principal at the time the order was made or when the engine was shipped, gave the buyer instead of a copy of the order, a somewhat similar document which had on its back warranties which, as far as they went, were practically

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the same as the ones in the order and the buyer was not told by the agent that it was a copy of his order and no fraud was practiced upon him, and where it appeared that if the buyer had read it that he could not have avoided learning that it was no copy of the order, he was bound by his order and was not justified in considering the warranty in the instrument given him, the only express warranty, and ignoring the special provisions in the warranty clauses in the order signed by him which were not contained in the other document.

2. SALE (§ II—27)—WARRANTIES EXPRESS AND IMPLIED—SALE OF ENGINE —BREACH OF WARRANTIES—R.S.S. 1909, CH. 147, SEC. 16, SUB-SEC. (1).

Where an order for the purchase of a traction engine signed by the buyer upon the receipt of which the seller sent the engine, warranted that the engine would successfully operate a threshing outfit of the size and capacity usually operated successfully by an ordinary steam engine of the same actual brake horse-power and that the engine should develop a certain horse-power and if it did not, the seller was, by a clause in the warranty part of the order to be notified and given reasonable time to get to the engine and test it, and, if unable to make the engine develop such horse-power, to take it back and replace it with another or, in place of this, to refund any payments made on the condition that no further claim was to be made against the seller, and where the order in one of its warranty clauses stated that if the purchaser failed to make the engine work satisfactorily through improper management, inefficient operators, or neglect to observe the directions of the manufacturers, the purchaser was to keep the engine and to pay all necessary expense incurred by any man sent at his request to put the engine in condition for successful operations, a compliance by both parties with the above provisions of the order should operate as a determination of all controversies respecting the subject matter, and, therefore, in an action by the buyer for breaches of the warranties in the order set out above and for the breach of the implied warranty arising under par. 1 of sec. 16, R.S.S. 1909, ch. 147, providing that there shall be an implied condition in sale of goods that if the particular purpose for which they are required is made known to the seller thus shewing that the buyer relied on the seller's judgment and if the goods are those which the seller sells in his business, in which action it was found by the trial Judge that the only breach of warranty the evidence shewed under the Act aforesaid, or under the order of purchase, was that the engine did not furnish the horse-power stipulated and in consequence did not successfully operate a threshing outfit according to the first warranty set forth above, no recovery can be had by the buyer on claims for breach of warranty, or by the seller on a counterclaim for the services of the experts to make the engine work properly where the evidence did not sufficiently shew that the buyer failed to make the engine do satisfactory work through improper management or inefficient operators as alleged in the counterclaim.

[*Head* v. *Tattersall*, L.R. 7 Ex. 7, 41 L.J. Ex. 4, at p. 5, 25 L.T. 631, 20 W.R. 115; *Hinchcliffe* v. *Barwick*, 49 L.J. Ex. 495, referred to.]

3. ESTOPPEL (§ III E—75)—WAIVER—SELLER OF ENGINE SENDING EXPERTS TO REMEDY DEFECTS—BUYER TO NOTIFY SELLER IN STIPULATED MANNER.

A strict compliance with the provision in an order for the purchase of an engine, that if the machine failed to develop the horse-power stipulated for in the order the seller should be immediately notified thereof by the purchaser in a specified manner, is waived by the seller sending out experts to remedy the defect upon a notice to them from the purchaser not exactly in accordance with such provision.

Statement

ACTION on alleged breaches of warranties in an order for the purchase of a traction engine signed by the plaintiff, upon the

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receipt of which the seller, the defendant, sent the engine, in which action the plaintiff relied on an implied warranty arising under par. 1, of sec. 16, of the Sale of Goods Act, R.S.S. 1909, ch. 147,* as well as on express warranties contained in the order that he signed and in which the defendant for the services of experts to which it was entitled to under certain circumstances set out in the buyer's order, the experts being sent by the seller to try to make the engine work properly.

Statement

There was judgment for the plaintiff on the defendant's counterclaim with costs and for the defendant on the plaintiff's claim with costs, one judgment to be set off against the other with execution to the party to whom the balance remains due.

A. W. Routledge, for the plaintiff.

E. B. Jonah, for the defendants.

Wetmore, C.J.

WETMORE, C.J.:—This agreement is partly printed and partly written. There were two documents each of which purported to be an agreement of sale, and is dated 1st June, 1910, and is in the form of an order to ship the engine to Davidson, and was prepared and filled in by one, Beare, the defendants' agent. Only one of these orders, however, was signed by the plaintiff, and that one was written and printed on yellow paper and was of a much larger size than the other one; I will call it No. 1. It was addressed to the defendants at Winnipeg and requested them to ship on or about the 1st August, 1910 (or as soon thereafter as possible) to Davidson one of their 45 brake horse power traction gasoline engines including all portions usually furnished with that style of engine, which the plaintiff agreed to accept on arrival subject to the warranty and agreement printed below and pay freight charges thereon from Regina, and upon delivery to pay to the order of the defendants $2,850.00 as follows: cash, $700.00, and execute two notes payable to the order of the defendants for $1,075.00 each payable respectively on the 1st day of November, 1911 and 1912, with interest at 8 per cent. per annum till due and 10 per cent. per annum after due until paid. Then follows a clause respecting the plaintiff's right to possess the engine, and as to the title thereto, and the right of the defendants to repossess it and sell it on certain things happening, etc., which are not material to the questions arising in the case, and then followed the warranty above referred to which is as follows:—

*Paragraph 1, of sec. 16, R.S.S. 1909, ch. 147, provides:—

Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to shew that the buyer relies on the seller's judgment and the goods are of a description which is in the course of the seller's business to supply (whether he be the manufacturer or not) there is an implied condition that the goods shall be reasonably fit for such purpose.

WARRANTY. This order is subject to the following warranty and agreement: The engine is warranted to be well made and of good material and workmanship. That if properly operated it will develop the rated brake horse power named in this order and is as economical in the consumption of fuel as any similar engine developing the same power under equal conditions.

That it will successfully operate a threshing outfit of a size and capacity usually operated successfully by an ordinary steam engine the actual brake horse power of which is the same.

That for traction work (if a traction engine) it will pull the same load that can be successfully and continuously pulled by any other gasoline traction engine of the same brake horse power.

Should any part prove defective within twelve months from date of shipment through inferior materials or workmanship the same shall be furnished by the Goold, Shapley & Muir Co. Ltd. on board the cars at Winnipeg, or the nearest point where repairs are carried, the defective part to be returned, prepaid to the Goold, Shapley & Muir Co. Ltd. at its nearest branch house for inspection, and if found defective the charge for the new part furnished will be remitted.

If the engine after being started fails to develop the horse power named in this contract, when properly tested, the Goold, Shapley & Muir Co. Ltd. shall be immediately notified by the purchaser by registered letter or telegram and given reasonable time to get to the engine and test it (the purchaser rendering necessary and friendly assistance) and if unable to make the engine develop the horse power named in this contract, the Goold, Shapley & Muir Co. Ltd. will take back the engine, and within ten days thereafter replace it by another engine or the payments made will be refunded, and no further claim is to be made on the company.

If the purchaser fails to make the engine do satisfactory work through improper management, inefficient operators or neglect to observe the printed or written directions of the manufacturers, then the purchaser is to keep the engine and also pay all necessary expense incurred by any man sent at his request to put the engine in condition for successful operation.

Continued possession of the engine for six days without complaint to the Goold, Shapley & Muir Co. Ltd. at its office in Winnipeg shall be sufficient evidence that this warranty is fulfilled.

This warranty does not cover batteries or any part which we do not manufacture. The sale is subject to strikes, accidents or delays after the engine is shipped.

I agree not to countermand this order and it is not binding if I am insolvent. I hereby acknowledge having a copy of the bargain made for the engine for which this order is given.

As a matter of fact neither a copy of this order, nor of the bargain made for the engine, was delivered to the plaintiff, but the other document which I have mentioned and which I will call "A" was delivered to him at the time, or immediately after, No. 1 was signed by him. That was a much smaller document than No. 1 and different from it in several respects as far as its contents were concerned. It was written and printed on white

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paper and was addressed to the defendants at Brantford, Ontario, and requested the engine to be shipped as soon as they could f.o.b. Brantford. It described the engine ordered as a 30-45 h.p. gas or gasoline traction engine including certain parts and then went on to specify a number of parts (which is not material) the price to be paid was the same as in No. 1 except that the cash payment was to be made and the notes delivered to the defendants as soon as the engine was started and working, and the notes were to bear interest at 7 per cent.

The document originally contained the following clause:—

> When experts are required a charge of $3.50 per day and expenses will be charged,

but the words and figures "3.50 per day" were marked out. There was also a somewhat lengthy clause following this which is not material and which it is not necessary to set out. On the back of this document was the following indorsement:—

> WARRANTY. We guarantee the engine named in this order to be made of first-class material and will develop the full horse power named in this order and is as economical in the consumption of fuel as any engine developing the same power under similar conditions.
>
> All defective material will be replaced when presented for inspection at our factory within twelve months from shipment. This warranty does not cover batteries or any part which we do not manufacture.
>
> No belting is included in this order. I am to pay extra for it if ordered.
>
> Sales subject to strikes, accidents, or causes beyond our control.
>
> GOULD, SHAPLEY & MUIR CO., LIMITED.

This was all printed including the name of defendant company.

This document as I have before stated was not signed by the plaintiff. No. 1 was the only order the plaintiff ever gave for the engine in question. It was not urged that there was any fraud in respect to this part of the transaction. As a matter of fact there was not any fraud, but the circumstances under which "A" was made out and delivered to the plaintiff seem to very seriously embarrass the disposition of the case. At the time the order No. 1 was made out and signed Beare had only one copy of the form for the order and he wrote No. 1 upon it. It was usual to give a copy of such order to the proposed buyer, and not having another form he filled in "A" which was a form used in the sale of stationary engines, and gave it to the plaintiff. The plaintiff swore that in so doing Beare stated it was a copy of the order he had signed.

I am fully satisfied that No. 1 was read over to the plaintiff before he signed it; the evidence is conclusive on that point, and I also find Beare did not tell him when he gave him "A" that it was a copy of No. 1; on the contrary he told him that he had

no more forms such as that on which No. 1 was written, and he could not give him a duplicate of No. 1. And I also find that when he gave him "A" he told him that he gave it to him in order "to give him something that he would have a hold on the Goold, Shapley & Muir Co. as a guarantee," or as Donald put it in his testimony, "to protect him with the warranty on the back." At the same time I find that the plaintiff at some time, I cannot say when, got impressed with the idea that the warranty on the back of "A" was a copy of the only express warranty given by the defendants. I do not see, however, how he could justifiably have come to that conclusion at the time "A" was delivered to him if he had carefully read it. He had just signed exhibit No. 1, which as before stated was read to him, and I assume he must have been aware of its contents. He knew that that document was the only order he gave to the defendants, and that it only therefore contained the bargain, and he also must have known that the warranty in No. 1 contained clauses not in the warranty indorsed on "A".

It is worthy of mention in this connection that there is no evidence that the defendants had any knowledge of "A" when they forwarded the engine in question. The only document ordering it or containing any terms upon which it was to be shipped and delivered that they were aware of was No. 1. But when I come to examine the warranty contained in "A", I find that in so far as it goes it is practically the same as that contained in No. 1, that is No. 1 which goes further (especially as to its special provisions) contains a warranty practically the same as that contained in "A". I hold that the plaintiff was not justified in considering the last mentioned warranty the only express warranty and ignoring the special provisions in the warranty clauses in No. 1. I find the only breach of any warranty, whether under the Act or under any express warranty, presented by the evidence was that the engine did not develop the horse power named in the order, and that it did not in consequence successfully operate a threshing outfit of a size and capacity usually operated successfully by an ordinary steam engine the actual brake horse power of which is the same. The engine did not work satisfactorily, and the evidence as to the cause of this was very conflicting. There were the usual witnesses on the one side attributing it to the defective machine, and on the other side attributing it to bad or careless operating.

I do not consider it necessary to express my opinion as to what was the reason for the engine not working satisfactorily, because assuming it to be due to a defect in the engine it would be a breach of warranty included in the order, and the parties have by a provision in No. 1 provided what is to be done in case of such a breach and have acted accordingly. The plaintiff

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notified the defendants through their agent that the engine failed to develop the horse power agreed on. (It is true that this notice was not given to the company as provided by the order, but the defendants waived strict compliance with that provision by sending out their experts to try and remedy the defect.) According to the plaintiff they failed to remedy such defect and he took the engine back and delivered it to the defendants' agent. The defendants accepted such delivery back and sold it to another person. The plaintiff has never paid the price of the engine nor any part of it, nor has he ever given any notes therefor, and the defendants have never requested him to do so.

I am of opinion that it was intended by the provisions of the contract with which I am now dealing that a compliance therewith should operate as a determination of all controversies respecting the subject-matter. This is in accord with the express provision in one clause and with what was suggested by Bramwell, B., in *Head* v. *Tattersall*, 41 L.J. Ex., at p. 5, and held by the Court in *Hinchcliffe* v. *Barwick*, 49 L.J. Ex. 495.

I may further state that I find the plaintiff requested the defendants' agent at the time he (the plaintiff) signed No. 1 to give a warranty that the engine would work a specific number of plows and that he refused to do so.

There will be judgment for the defendants on the plaintiff's claim with costs. The ground on which I have turned the aforegoing part of this judgment does not appear to have been jurisdictionally raised by the statement of defence. I only discovered this after I had prepared such judgment. It was, however, distinctly raised by Mr. Jonah in his closing address and he cited authorities in support of it. No objection was raised that it was not open to him to do so under the pleadings. Under the circumstances as counsel treated the matter so, I see no reason why I should not do so.

The defendants' counterclaim for the services of the experts in going out to endeavour to make the engine work properly:—The evidence does not satisfy me that the plaintiff failed to make the engine do satisfactory work through improper management or inefficient operation as alleged in the counterclaim. There will, therefore, be judgment for the plaintiff on the counterclaim, with costs, one judgment to be set off against the other, and the party to whom the balance remains due after such set off to have execution therefor.

Principal claim dismissed; counterclaim dismissed.

Re DINNICK v. McCALLUM.

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Ontario Divisional Court, Britton, Teetzel and Kelly, JJ. June 20, 1912.

1. BUILDINGS (§ I A—9*a*)—STATUTORY REGULATION—RESIDENTIAL STREET —CORNER LOT—MUNICIPAL ACT (ONT.) SEC. 541*a*, AS ENACTED BY 4 EDW. VII. (ONT.) CH. 22, SEC. 19.

A building is on a residential street and the residential street is in front of the building, within the meaning of sec. 541*a* of the Consolidated Municipal Act, 1903, as enacted by the Municipal Amendment Act, 4 Edw. VII. (Ont.) ch. 22, sec. 19, when it is on a corner and one side faces upon the residential street, though the front of it faces upon another street.

2. MUNICIPAL CORPORATIONS (§ II C 3—134*a*)—BY-LAW PROHIBITING ERECTION OF BUILDINGS UPON CERTAIN RESIDENTIAL STREETS—VALIDITY OF—4 EDW. VII. (ONT.) CH. 22, SEC. 19.

A municipal by-law prohibiting the erection of buildings upon the lots fronting or abutting on a residential street within a certain distance from the street line is within the authority conferred by sec. 541*a* of the Consolidated Municipal Act, 1903, as enacted by 4 Edw. VII. (Ont.) ch. 22, sec. 19.

3. MUNICIPAL CORPORATIONS (§ II C 3—62)—VALIDITY OF BY-LAWS PASSED —REASONABLENESS—GROUNDS OF INVALIDATION—WITHIN POWERS.

If a municipality have power to pass a certain by-law, the question of its reasonableness is, generally speaking, one for the judgment and conscience of the council, and, except in extreme cases, the Court will not hold by-laws passed by municipal bodies within the limits of their authority to be invalid for unreasonableness.

[*Kruse* v. *Johnson*, [1898] 2 Q.B. 91; *Stiles* v. *Galinski*, [1904] 1 K.B. 615, referred to.]

4. MUNICIPAL CORPORATIONS (§ II C 3—62)—BY-LAW RESTRICTING BUILDINGS ON STREET—UNREASONABLENESS—OWNER NOT ABLE TO MAKE MOST PROFITABLE USE OF HIS LOT—GOOD FAITH OF MUNICIPALITY.

The fact that a municipal by-law may have the effect of preventing a resident of the municipality from making the most profitable use of his property is not any ground for holding the by-law invalid for unreasonableness, so long as it is within the powers of the municipality and honestly passed in the public interest.

Statement

MOTION by W. L. Dinnick for a mandamus directed to the Corporation of the City of Toronto and the City Architect (McCallum) to issue a permit to the applicant for the erection of an apartment house on the north-east corner of Avenue road and St. Clair avenue, in the city of Toronto.

April 12, 1912. The motion was heard by RIDDELL, J., in Chambers.

W. C. Chisholm, K.C., for the applicant.

H. Howitt, for the respondents.

Riddell, J.

April 15, 1912. RIDDELL, J.:—By the Act (1904) 4 Edw. VII. ch. 22, sec. 19 (adding sec. 541*a* to the Consolidated Municipal Act, 1903), it was provided that "the councils of cities . . . are authorised . . . to pass and enforce . . . by-laws . . . to regulate and limit the distance from the line of the

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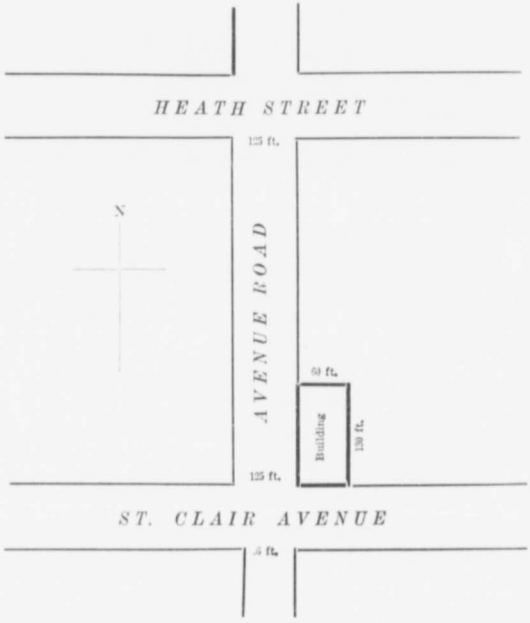
street in front thereof at which buildings on residential streets may be built; such distance may be varied upon different streets or in different parts of the same street."

The Council of the City of Toronto, purporting to act under the powers given by this statute, in December, 1911, passed by-law No. 5891, containing the following provision: "No building shall hereafter be built or erected on the lots fronting or abutting on both sides of Avenue road from St. Clair avenue to Lonsdale road, within a distance of 40 feet from the east and west lines of the said road, and no person shall hereafter erect or build any such building in contravention of this by-law."

Avenue road is admittedly a "residential street," within the meaning of the Act.

Mr. Dinnick, being the owner of the block of land at the north-east corner of St. Clair avenue and Avenue road, desired to build an apartment house at the corner, 60 feet on St. Clair avenue and 130 feet on Avenue road (see rough plan.)



Drawing up all proper plans and specifications, he applied to the City Architect for a building permit, which was refused—solely on the ground that the proposed building would be in violation of by-law 5891.

Upon motion for a mandamus, the city corporation did not insist upon any technical objection—and the real matters to be decided are the validity of the by-law and its application to the present case.

It is admitted that the building "fronts" on St. Clair avenue.

The first and substantial contention of the applicant is that the legislation does not empower the city council to pass a by-law prohibiting the erection of a building within a certain distance of a residential street, unless the proposed building "fronts" on the street.

I do not agree with that contention: the power is given to limit the distance of buildings from the line of the street in front of the proposed buildings; the street is in front of the building, indeed, but that does not necessarily imply that the part of the building which is in common parlance called the front should face or look toward the street.

Any side or face of a building is a front, although the word is more commonly used to denote the entrance side: New English Dict., *sub voc.* "Front," p. 563, col. 3, para. 6. "Back-front," "rear-front," the "four fronts" of a house, are all terms in common use—and there is no reason why a building should not "front" on two, three, or four streets—or that two, three, or four streets should not be "in front thereof"—all such streets would, I think, "confront" the building: New English Dict., "Front," p. 564, col. 1, para. 10 (a).

We must look at the object of the legislation. It must be plain that the whole object was to enable the city to make residential streets more attractive, etc., by preventing building out to the street line—it would make a farce of the legislation if persons were to be allowed to build with the gable ends of their houses toward the street and up to the line of the street, claiming that they did not front on the street, and, therefore, the street was not "in front thereof." And it would be no less absurd to say that, if people could not build in that way in the middle of the block, they could at the corners. I am of the opinion that the power exists to prevent any buildings being placed within a distance (of course reasonable) of the line of a residential street.

Then it is said that this is in effect an expropriation of the applicant's land on St. Clair avenue; but this is an argument to be advanced to the Legislature and to the council.

The by-law is, perhaps, not very well drawn—it is not lots through which Avenue road runs, and which, therefore, are "on both sides of Avenue road," which are meant, but lots on each side. But the language is quite intelligible, and can fairly be

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made to cover the lot of the applicant. "East and west lines" must, of course, be read distributively. No objection can be taken to the prohibition to "build on the lots fronting or abutting on . . . Avenue road," where the legislation authorises a prohibition to build on any lot within the fixed distance of the line of the street.

I should dismiss the motion, but that a decision of the Chief Justice of the King's Bench has been brought to my attention *City of Toronto* v. *Schultz** (1911), 19 O.W.R. 1013, which seems

*CITY OF TORONTO v. SCHULTZ.
SCHULTZ v. CITY OF TORONTO.

The first-named action was begun on the 19th August, 1911, by the Corporation of the City of Toronto, plaintiffs, against Robert H. Schultz, defendant. The plaintiffs' claim was "for an injunction to restrain the defendant from erecting a building at the north-west corner of Spadina road and Bloor street, in the city of Toronto, within twenty-five feet from the west line of Spadina road, in contravention of the provisions of by-law number 4535 of the City of Toronto."

The second action was begun on the 1st September, 1911, by Robert H. Schultz, plaintiff, against the Corporation of the City of Toronto, defendants. The plaintiff's claim was "for a declaration that he is entitled to be granted a permit to erect a building on the north-west corner of Bloor street and Spadina road, and for a mandatory injunction for the issue of such permit."

By-law No. 4535, passed by the city council on the 8th May, 1905, was in part as follows:—

"Whereas by the Municipal Amendment Act, 1904, the councils of cities and towns are authorised and empowered . . . to pass and enforce such by-laws as they deem expedient to regulate and limit the distance from the line of the street in front thereof on which buildings on residential streets may be built, and it is therein provided that such distance may be varied upon different streets or in different parts of the same street:—

"And whereas the parts of the streets hereinafter referred to are residential streets . . . ;—

"Therefore, the Council of the Corporation of the City of Toronto enact as follows:—

"1. No building shall hereafter be built or erected on the lots fronting or abutting on each side of Spadina road, Walmer road . . . between Bloor street and Bernard avenue within a distance of 25 feet from the east and west lines of each of the said streets respectively . . . and no person shall hereafter erect or build any such building in contravention of this by-law. . . ."

The plaintiffs in both actions moved for interim injunctions in respect of the claims made by them.

An assistant in the office of the Architect for the City of Toronto stated on affidavit that he had charge of supervising the structural work for buildings, plans of which were submitted to the City Architect; that on or about the 10th July, 1911, Schultz left at the office of the City Architect plans for an apartment house building on the vacant lot at the north-west corner of Bloor street and Spadina road, in the said city; that the plans shewed the location of the proposed building to be closer than 25 feet to the west limit of Spadina road; that on the 13th July, 1911, notice in writing was sent to Schultz . . . and he was informed that the permit for the building could not be granted, by reason of the structure being shewn closer than 25 feet to the west limit of Spadina road, and reference was made to city by-law No. 4535.

Schultz stated on affidavit that he was the owner of the lands at the north-west corner of Bloor street and Spadina road, having a frontage on Bloor street of 82 feet 6 inches by a depth of 100 feet to a lane; that he purchased the lands in the latter part of the year 1909, and did not know until some time thereafter of the restriction alleged to be imposed by the by-law

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to be decided the other way. I am not at liberty to disregard the Ontario Judicature Act, R.S.O. 1897, ch. 51, sec. 81 (2)†; but as, with the utmost respect, I "deem the decision previously given to be wrong and of sufficient importance to be considered in a higher Court," I refer this case to a Divisional Court.

The motion was reheard by a Divisional Court composed of BRITTON, TEETZEL, and KELLY, JJ.

W. C. Chisholm, K.C., for the applicant. In the first place, the by-law is invalid on its face, because it does not in its terms comply with the enabling Act. The Act refers to buildings fronting on a street, whereas the by-law deals with lots fronting on a street: *Re Kinghorn and City of Kingston* (1866), 26 U.C.R. 130, at p. 134; *Re Peck and Township of Ameliasburg* (1889), 17 O.R. 54; *Re Hay and Town of Listowel* (1897), 28 O.R. 332. Even if the by-law was validly drawn, it is not applicable to a case like the present. This building is not on Avenue road, but on St. Clair avenue, which is the street "in front thereof," within the meaning of the Act, and there is no restriction on that thoroughfare: *Connecticut Mutual Life Insurance Co.* v. *Jacobson* (1899), 75 Minn. 429, at p. 432; Murray's New English Dict., "Front." The by-law, in any event, is unreasonable and dis-

No. 4535; that the lands were assessed and taxed for their full frontage on Bloor street; that the lands are very valuable; that he duly made an application for a permit to erect an apartment house fronting on Bloor street upon his said lands, and filed plans and specifications in accordance with the building by-laws and regulations of the plaintiffs, but was refused a permit, on the ground only that his said building was shewn to be closer than 25 feet to the west limit of Spadina road; that, after giving the plaintiffs (the city corporation) reasonable notice and demanding that they should issue a permit, and not having within a reasonable time been granted the same, but being refused the same for the reason above given, he began preparations for the erection of the building.

Schultz also stated in his affidavit that a number of other buildings had been erected upon Spadina road, in contravention of by-law No. 4535, since the passing of that by-law.

In an affidavit, in reply, made by the Assistant City Architect, it was stated that prior to by-law No. 5400, passed on the 13th December, 1909, amending the city's building by-law No. 4861, the City Architect could not refuse permits for buildings, on the ground of their infringing other civic regulations, if the buildings complied with by-law No. 4861; but by-law No. 5400 gave the City Architect power so to refuse; and he could find no case in which a permit had been issued, since the passing of by-law No. 5400, for the erection of a house on Spadina road south of Bernard avenue, and he believed that no permit had been issued since that date.

September 7, 1911. Both motions came on for hearing before FALCONBRIDGE, C.J.K.B., in the Weekly Court at Toronto, and were, by consent, turned into motions for judgment in the respective actions.

G. A. Urquhart, for the Corporation of the City of Toronto.

Grayson Smith, for Schultz.

FALCONBRIDGE, C.J., at the conclusion of the argument gave judgment in favour of Schultz, holding that the restriction in by-law No. 4535 did not apply to the building which Schultz proposed to erect, fronting on Bloor street.

The action of the city corporation was dismissed with costs; and judgment given in Schultz's action for the relief claimed by him with costs.

† See now 2 Geo. V. ch. 17, sec. 10, assented to on the 16th April, 1912.

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criminatory in that its effect is to deprive many persons of the unrestricted use of their property: *Kruse* v. *Johnson*, [1898] 2 Q.B. 91.

H. L. Drayton, K.C., and *H. Howitt*, for the respondents. The cases cited as to variance have no applicability here. In all of them, the variations were in excess of statutory powers, whereas here the council did not go the full length of the authority conferred by the Act. As to the applicability of the by-law as it stands, that depends on whether the building can be said to be "on Avenue road." Is Avenue road "in front thereof"? We submit that any side or face of a building is the front: *Justices of Bedfordshire* v. *Commissioners for Improvement of Bedford* (1852), 7 Ex. 658, and at p. 665. St. Clair Avenue is to-day a residential street. And it would be a farcical state of affairs to think that the corner houses would be allowed to jut out, while the intervening ones were set back. There can be no doubt as to the object of the Legislature, which was to get a wide street. When the Legislature used the words "residential streets," the whole of a residential street was intended. The building in question is within the restriction imposed by the by-law. The by-law is in no sense unreasonable or discriminatory.

Chisholm, in reply.

Teetzel, J.

June 20, 1912. TEETZEL, J.:—A motion by W. L. Dinnick for a mandamus directed to the Corporation of the City of Toronto and the City Architect, to issue a permit to the applicant for the erection of an apartment house on the corner of Avenue road and St. Clair avenue, was heard before Mr. Justice Riddell, sitting in Chambers, and that learned Judge, being of opinion that, but for a decision of the learned Chief Justice of the King's Bench, in *City of Toronto* v. *Schultz*, 19 O.W.R. 1013, he should dismiss the motion, referred the same to a Divisional Court, under sec. 81 of the Judicature Act.

By 4 Edw. VII. ch. 22, sec. 19, it was provided that "the councils of cities . . . are authorised . . . to pass and enforce . . . by-laws . . . to regulate and limit the distance from the line of the street in front thereof at which buildings on residential streets may be built; such distance may be varied upon different streets or in different parts of the same street."

Purporting to act under the authority conferred by this statute, the city council, in December, 1911, passed a by-law, number 5891, containing the following provision: "No building shall hereafter be built or erected on the lots fronting or abutting on both sides of Avenue road from St. Clair avenue to Lonsdale road, within a distance of 40 feet from the east and west lines of the said road, and no person shall hereafter erect or build any such building in contravention of this by-law."

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That Avenue road is a "residential street," within the meaning of the Act, is not disputed.

Lonsdale road is its northern terminus; the section covered by the by-law was originally laid out at the unusual width of 125 feet; and a substantial portion of it has not yet been built upon.

The applicant, being the owner of a block of land at the north-east corner of St. Clair avenue and Avenue road, and desiring to build an apartment house on the corner 60 feet on St. Clair Avenue and 130 feet on Avenue road, the proposed front facing St. Clair avenue, prepared all proper plans and specifications, and applied to the City Architect for a building permit, which was refused, solely on the ground that the proposed building would be in violation of by-law 5891.

The matter to be decided is as to the validity of the by-law, and its application to the present case.

The points urged against the by-law by Mr. Chisholm were: (1) it does not in its terms comply with the enabling Act; (2) even if its terms complied with the Act, it is not applicable to a case like the present; and (3) it is discriminatory in its operation, and unreasonable.

Upon the first point, the language of the authority is, "to regulate and limit the distance from the line of the street in front thereof at which buildings on residential streets may be built," while the by-law only prohibits building "on the lots fronting or abutting on . . . Avenue road . . . within a distance of 40 feet from the east and west lines of said road;" so that, as pointed out by Mr. Chisholm, if a fronting or abutting lot had a depth or width, measured from Avenue road, of less than 40 feet, a building erected on land adjoining such lot to the rear, although within 40 feet of the street line, would not be within the operation of the by-law, notwithstanding that such building might possibly be described as *on* Avenue road, within the meaning of the Act.

There is nothing in the material to shew that, in any survey of lots fronting or abutting on Avenue road, is there any lot in reference to which such an incongruous result might follow; but, even if such a result is possible, I do not think that the by-law can be held to be invalid for that reason. The statute does not require that the distance limited by the by-law shall be uniform, but expressly provides that "such distance may be varied upon different streets or in different parts of the same street."

Presumably, although perhaps not necessarily in every case, a building on a residential street must be built upon a lot "fronting or abutting thereon," so that, while it may be that the council, in limiting the restriction to buildings "on lots fronting or abutting on Avenue road," etc., instead of imposing the restriction generally to all buildings to be erected on that street, may not have gone the full length of the authority conferred by the Act, I think it

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has clearly kept within that authority; for, while the Act, no doubt, confers authority to impose the restriction in regard to all buildings to be erected on the street in question, it does not require the restriction to be imposed upon all buildings, and, as pointed out, express authority is given to vary the distances in different parts of the street.

Then, assuming the by-law to be valid, is it applicable to the building in question? The answer to this depends upon whether when erected the building can be properly described as being *on* Avenue road, within the meaning of the words of the Act, "buildings on residential streets."

Mr. Chisholm argues that this building is on St. Clair avenue, and not on Avenue Road, and that that street, and not Avenue road, is "in front thereof," within the meaning of the Act.

The word "on" used in this connection, in its ordinary and natural meaning, signifies "In the relation of . . . environing, or lying along or by:" Standard Dictionary, *sub voc.* "on," p. 1228, col. 3, para. 4; and also "In proximity to, close to, beside, near:" New English Dictionary, *sub voc.* "on," p. 114, col. 2, para. 3.

Then as to the words "line of the street in front thereof," as pointed out by my brother Riddell, citing the New English Dictionary: "Any side or face of a building is a front, although the word is more commonly used to denote the entrance side. . . . 'Back-front,' 'rear-front,' the 'four fronts' of a house, are all terms in common use—and there is no reason why a building should not 'front' on two, three, or four streets—or that two, three, or four streets should not be 'in front thereof'—all such streets would, I think, 'confront' the building."

The manifest object of the Legislature was to enable councils of cities and towns to make residential streets more attractive, etc., by preventing buildings being placed out to the street-line; and it would largely defeat such purpose if a by-law could only be made applicable to buildings to be erected on inside lots, and not to buildings on corner lots. When the Legislature used the words "residential street," *primâ facie* the whole of such street must have been intended, and not merely the portion in front of inside lots; so that, in the absence of any reservation in favour of owners of corner lots, the street from end to end and from limit to limit must be included.

While a building at the corner of two streets is numbered on the street upon which its main entrance fronts, and is in common parlance spoken of as "on that street," it also lies along or borders on the other street, and in the relation of environing is also on that street, and such street would also be in front of that part of the building adjoining it.

Having, therefore, regard to what appears to me to be the natural meaning of the words "street in front thereof" and

"buildings on residential streets," and to the object of the Legislature, I think the building in question, although the proposed entrance is from St. Clair avenue, would, nevertheless, be a building on Avenue road; and would, therefore, be within the restriction imposed by the by-law.

Then, is the by-law discriminatory in its operation, or is it so unreasonable that it should be declared invalid?

If it should transpire, which is very unlikely, that there are any lots fronting or abutting on Avenue road, less than 40 feet in depth or width, the by-law as worded might not, as pointed out above, apply to a building erected on adjoining land; and in that case the by-law might have the effect of discriminating in favour of such building; yet, as the council is entitled to vary the distance in any part of the street, and has limited the application of the by-law to buildings on lots fronting or abutting on Avenue road, as I think it had the right to do, I do not think the by-law is open to attack on this ground.

There remains the question whether the by-law ought to be held invalid for unreasonableness, in that its effect upon the applicant and others is to deprive them of the unrestricted use of their property, and in that it is limited in its operation to buildings on lots fronting or abutting on the street in question, in respect of both which matters I have already expressed the view that the by-law is within the power conferred by the Act.

Given the power to pass the by-law, the question of its reasonableness is, generally speaking, for the judgment and conscience of the council; and, except in extreme cases, it is well settled that the Court will not hold by-laws passed by municipal bodies, within the ambit of their authority, to be invalid for unreasonableness. This proposition was not contested by Mr. Chisholm, and is supported by *Kruse* v. *Johnson*, [1898] 2 Q.B. 91, cited by him, and by *Stiles* v. *Galinski*, [1904] 1 K.B. 615, in which Lord Alverstone, C.J., at p. 621, says: "On all practical matters, provided they come within the ambit of the powers of the local authority as to making by-laws, the discretion of the local authority ought not, in my opinion, to be lightly interfered with, and only when it is quite clear that the by-law in question is in conflict with some legal principle. I agree with that which Lord Russell of Killowen, C.J., said in *Kruse* v. *Johnson* (*supra*), that by-laws ought to be supported if possible, and that the Court ought to be slow to condemn as invalid any by-law on the ground of supposed unreasonableness."

See also *Leyton Urban District Council* v. *Chew*, [1907] 2 K.B. 283.

While this by-law may have the effect of depriving the applicant of making the most profitable use possible of his property, that is not—assuming that the by-law is authorised and was

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honestly passed in the public interest—any ground for holding it invalid for unreasonableness.

As stated by Wright, J., in *Simmons* v. *Malling Rural District Council*, [1897] 2 Q.B. 433, at p. 438: "I do not think that a by-law should be held unreasonable on the ground that in a particular case inconvenient consequences might result from its enforcement; it is the public interest as a whole which has to be considered." See also *Slattery* v. *Naylor* (1888), 13 App. Cas. 446, where it was held that a by-law made in pursuance of a Municipal Act, empowering councils to make by-laws for regulating the interment of the dead, is not *ultra vires*, by reason of its prohibiting interment altogether in a particular cemetery and thereby destroying the private property of the owners of burial places therein.

Judgment will, therefore, be dismissing the application with costs.

Kelly, J.

KELLY, J.:—At the close of the argument, I was of opinion that the applicant was not entitled to succeed. Further consideration has strengthened this conviction.

What the Legislature evidently had in view, when passing the Act giving the councils of cities and towns the power which the Council of the City of Toronto purported to exercise in this instance, was the improving and beautifying of the localities or districts to which by-laws such as that now in question would be made to apply. This intention of the Legislature would not be fully effected if the restriction against building applied only to inside lots, and did not include as well the lots or lands at the corners of the street.

The meaning to be given to the language of the Act and the by-law has been fully considered in the judgment of my brother Teetzel, with which I agree.

The lot or land of the applicant does not cease to abut on or front on Avenue road by the mere fact that the building intended to be erected thereon is so designed as to have its entrance from another street, and that the entrance will be from such other street only.

Moreover, in regard to the distance from the line of the street at which buildings may be built, there is power given by the Act to vary the distance in different parts of the same street; no such variation was provided for by the by-law in this case. In the absence of some express provision to that effect, I do not think this property is excepted from the operation of the by-law.

It was contended during the argument that the by-law works seriously to the disadvantage of the applicant. That is, no doubt, true; and the inclination would be to grant relief but for being prevented by the Act and the by-law. In many instances, legislation which, as is apparently the case here, is intended for

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the common benefit, or for the benefit of a considerable section of the public, operates as a disadvantage to one or other of the persons affected by it. That, however, does not of itself invalidate the legislation.

In my view, therefore, the application fails.

BRITTON, J. (dissenting):—The Council of the City of Toronto is authorised by 4 Edw. VII. ch. 22, sec. 19 (1904), to pass and enforce by-laws to regulate and limit the distance from the line of the street in front thereof at which buildings on residential streets may be built. Avenue road, as admitted, is a residential street. The power of the city in this particular matter is limited to passing a by-law to regulate and limit the distance from the line of Avenue road, in front of that road, at which buildings on Avenue road may be built.

The city council did pass a by-law on the 4th December, 1911, *viz.*, by-law No. 5891, the first clause of which is as follows: "No building shall hereafter be built or erected on the lots fronting or abutting on both sides of Avenue road from St. Clair avenue to Lonsdale road, within a distance of 40 feet from the east and west lines of the said road, and no person shall hereafter erect or build any such building in contravention of this by-law."

Assuming, for the sake of argument, that this by-law was not in excess of the jurisdiction of the city, by reason of its prohibiting the building on lots fronting or abutting on Avenue road, then an interpretation must be given to the words "building on residential streets," that is, in this case, a building upon Avenue road. Is a building, 40 feet or less distant from the line of Avenue road, close to another street, and with the entrance to the building from that other street, and with no entrance to the building from Avenue road, a building upon Avenue road, within the meaning of the statute? I do not think so. Dinnick's proposed building is to be a building upon St. Clair avenue.

It may or may not be at a distance of 40 feet from St. Clair avenue—that is not in question here. Should the building to be erected facing or fronting on St. Clair avenue have as a lawn or garden all the land between the west side of it and Avenue road, enclosed by fences, one fence running from the corner of St. Clair avenue and Avenue road northerly, to the northerly limit of Dinnick's lot, could that be prevented by any by-law passed by the city by virtue of the estate cited? I think not—and that seems to me one way of testing the power of the city in the case under consideration.

I quite agree that, "if the by-law is reasonable, it ought to be supported, if possible, and that the Court ought to be slow to condemn as invalid any by-law on the ground of supposed unreasonableness." My reason for holding as I do is, that I cannot take the words "buildings on residential streets" as having any

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meaning other than as fronting upon or having access to them from the street in question. Restricting the right of the owner to a certain use of his property is a quasi expropriation of part of that property for the use of the city. It is of benefit to the city at large. The policy of the law is to allow cities, at the expense of the owners of property, to restrict and limit the rights of owners; but, when this is done, the restriction and limitation must be clearly within legislative authority. If the Legislature intended that the owner of a lot upon the corner of two residential streets cannot erect any building upon it, within the distance of a specified number of feet from the line of street, it should say so in clearer language than has been used in the Act relied upon by the city in this case.

In my opinion, the order for mandamus should go.

Application dismissed; BRITTON, J., *dissenting.*

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Ontario High Court. Trial before Kelly, J. July 16, 1912.

1. BANKS (§ IV A 1—49)—DEPOSITS—CHANGING ACCOUNT TO JOINT ACCOUNT—SUFFICIENCY OF NOTICE TO MAKE CHANGE.

A written notice to a bank by a depositor to so "arrange" the latter's savings deposit account (then standing in her own name) in the name of the depositor's daughter that the latter can draw the money, is not sufficient authority to the bank to transfer the deposit to the joint account of the mother and daughter withdrawable by either with right of survivorship.

2. GIFT (§ I—7)—BANK DEPOSIT IN NAME OF MOTHER—NOTICE TO BANK—JOINT ACCOUNT—ABSENCE OF INTENTION TO MAKE GIFT.

Where one who has a sum of money on deposit in the savings department of a bank, being ill in the hospital, signs a written memorandum instructing the bank to arrange her money in her daughter's name so that she can draw it, which she hands to her daughter to take to the bank, saying, "If anything should happen to me in the hospital, take my money and my furniture and do the best you can with it," and requesting the daughter to pay her funeral expenses, and the bank thereupon changes the heading of the account so as to make it appear as a joint account in the name of the mother and daughter, and the deposit book remains in the mother's possession until her death, and there is no evidence of any intention of the mother to do more than make an arrangement by which, for convenience, the daughter could draw the money, the daughter has no right to the money at her mother's death, either by survivorship or otherwise.

[*Payne* v. *Marshall*, 18 O.R. 488, and *Marshall* v. *Crutwell*, L.R. 20 Eq. 328, applied; *Lowe* v. *Carter*, 1 Beav. 426; *Re Ryan*, 32 O.R. 224, and *Schwent* v. *Roetter*, 21 O.L.R. 112, distinguished; *Hill* v. *Hill*, 8 O.L.R. 710, specially referred to.]

Statement

ACTION by the executor of Elizabeth Kenny, deceased, against Esther Dunkley and the Canadian Bank of Commerce, to recover for the benefit of the estate of Elizabeth Kenny a sum of $542.17 in the hands of the defendants, or one of them, and to restrain the defendants from dealing with these moneys.

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J. A. Walker, K.C., and *M. Houston*, for the plaintiff.

W. G. Richards, for the defendant Dunkley.

O. L. Lewis, K.C., for the defendant the Canadian Bank of Commerce.

KELLY, J.:—The plaintiff, who is the executor of the last will of Elizabeth Kenny, deceased, claims $542.17, and an injunction restraining the defendants from dealing in any manner with these moneys, which were on deposit with the defendants, the Canadian Bank of Commerce, at the time of Elizabeth Kenny's death.

Testatrix Elizabeth Kenny made her will on the 16th November, 1911, and thereby appointed the plaintiff, one of her sons, as sole executor. She died in the city of Chatham on February 27th, 1912, and probate of the will was granted on April 4th, 1912, to the executor.

The assets, as claimed by the executor, consisted of some household furniture and the moneys so on deposit.

Defendant Esther Dunkley is the only daughter of the deceased, and is a half-sister of the plaintiff.

Deceased by her will gave to the executor $300 to be used by him for the benefit of another son, Charles Kenny, subject to certain directions as to the control thereof, and as to the conditions on which payment was to be made to Charles. The household furniture was given to the executor in trust for the use and benefit of Charles, with the right to the executor to retain possession of it until Charles should "alter his present mode of living" and all the rest of the estate was given to the plaintiff.

Defendant Esther Dunkley claims to be the owner of the money under the circumstances hereinafter set forth, and alleges, in her defence, that her mother at the time of making the will was not of sound mind, memory or understanding, and that if she signed the will, her signature was obtained by undue influence on the part of the plaintiff and his wife and others acting with them.

At the trial the claim of undue influence was abandoned, and there is no evidence that any such existed.

The defences, therefore, relied upon by the defendant Esther Dunkley are: first, that the moneys in question were held by her mother, Elizabeth Kenny, in trust for her after her father's death, under an alleged understanding between her father and mother in 1896; secondly, that the money in the bank was held by the mother and this defendant in joint account with a right of survivorship in the latter; and, thirdly, that the mother was mentally incapable of making the will.

Dealing with the last of these claims, I find that at the time of making the will the testatrix was of sound mind and fully

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capable of making a will and disposing of any assets which she had

The evidence shews that the testatrix had at times suffered from neuralgia, that on November 8th, 1911, she was taken ill in her rooms where she lived with her son Charles, and from that date until November 13th, her daughter stayed with her a considerable part of the day time, but not at night. The daughter says that during that time her mother was in a condition in which she did not at times understand what was taking place around her, that she had delusions, she did not recognize her or other members of the family who called on her, and that she had a stroke of paralysis on or about November 8th.

On November 14th, Esther Dunkley being ill was taken to the hospital, and for several weeks following November 13th, she did not see her mother.

Elizabeth Liddy says she was in deceased's room for a few minutes on November 15th, that the deceased was then sitting up but did not know her or her daughter-in-law, the wife of the plaintiff, that on the following day, when she called, the deceased had difficulty in recognizing her and mistook her for the doctor. This witness on that day had come to borrow from the deceased $5 for the daughter, Esther Dunkley, and she admits that deceased was capable of understanding the nature of her message, and, of her own accord and without assistance, took from a pocket-book, which she had under the mattress of her bed, the exact amount of money asked for, and gave it to her. Her evidence on this point does not bear out her general statements about the mental condition of the testatrix.

The plaintiff and his wife and his son and Charles Kenny all deny that on the day the will was made deceased displayed the mental weakness which was claimed by Esther Dunkley and Mrs. Liddy. Then there is the evidence of the doctor and others who were present when the will was made, some of whom can be said to be disinterested witnesses.

Dr. Holmes, a practitioner of over forty years' standing, who was deceased's medical adviser, visited her daily for several days beginning on November 9th, and saw her just before the making of the will, when he says she was in her "normal mental condition," and capable of doing business. Referring to the statements made to the effect that deceased suffered from paralysis, he adds that she never was paralyzed, and that he never believed her brain was affected.

Henry Dagneau, a friend of deceased, for whom she sent some days previously to consult about making her will, and who was present at the time the will was made, and Mr. Clarke, the solicitor called in by Dagneau, say positively that she was in a fit and proper condition to make the will. It is shewn, too,

by the evidence of Dagneau and Clarke and others that, without suggestion from any one, she gave the instructions from which the will was drawn.

On the whole evidence, therefore, I am clearly of opinion that the deceased at the time of making her will was in a fit mental condition and perfectly competent to do what she did.

The defendant Esther Dunkley, to establish her claim that the moneys in question were held by her mother in trust for her, after her mother's death, alleges that in 1896 a purchase of some property was made by Esther Dunkley's father, Lewis Kenny, and that the deed thereof was made to his wife, Elizabeth Kenny, on the understanding that the daughter, Esther Dunkley, would have it after her death. The father died about eleven years ago; and Elizabeth Kenny in 1909 sold the property; and the daughter asserts that $800 out of the proceeds of the sale was deposited in the Canadian Bank of Commerce in the account now in question, and that the moneys sued for are part of that $800.

To support her contention, she produced a will made by her mother, in January, 1899, when she was suffering from an attack of typhoid fever, by which she purported to devise to her husband, Lewis Kenny, and this daughter, the lands acquired by her in 1896, to hold to them jointly during the lifetime of the husband and at his death to the daughter, her heirs and assigns.

To corroborate this, John H. Barnes, one of the witnesses to that will, was called, and swore that, at the time of the making of the will, he heard Mrs. Kenny say she wanted Mrs. Dunkley to have the place; that that was the understanding between her and her husband.

Mrs. Liddy says she was in the adjoining room when the will was being made, and that she heard Mr. and Mrs. Kenny say the property would go to the daughter after their death.

The evidence of Charles Kenny, on the other hand, is, that, at the time the prior will was made, his mother was so ill as not to be able to recognise him, and that a few months before her death she informed him that she did not know of the will until two weeks after she had been returned from the hospital after her recovery from the fever.

There is some doubt, too, about the ownership of the money with which the purchase of the property was made in 1896; and I am unable to say on the evidence that it is clear that it belonged to Lewis Kenny, and not to his wife.

I am not prepared to accept the evidence of the trust as sufficient to establish it. I believe that the defendant Esther Dunkley's account of the terms of the alleged understanding that the property was to be hers on the death of both her parents, was suggested to her largely by reading the prior will.

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The evidence of Barnes and Mrs. Liddy is consistent with the terms of the will, and does not go further than to shew the intention of the testatrix at that time to make her daughter her devisee subject to the benefits given to the husband.

Mrs. Liddy's evidence throughout was weakened by an evident bias in favour of Esther Dunkley, and must be accepted with some hesitation.

Though Esther Dunkley alleges that there was the understanding at the time of the purchase of the property that she would be entitled to it after the death of her parents, and that she knew of the understanding at that time, her subsequent conduct in no way indicated that she believed or relied upon such understanding.

When the property was sold about three years ago, she was present, and saw and heard her mother make a statutory declaration the terms of which might well indicate a denial of any trust in favour of the daughter, and it does not appear that either then or at any other time in her mother's lifetime she asserted any right to the property, or made the question of the alleged trust a subject of conversation either with her mother or with any other person. Moreover, when there was talk of a new will being made, in November, 1911, the daughter shewed considerable concern, and she says she warned Dagneau against drawing a new will.

Considering that all that the mother owned or professed to own at that time, outside of the furniture, which was of little value, was the money in question, which the daughter now claims was held in trust for her, one cannot well understand this concern or her anxiety that a new will should not be made, if she really believed the property was held in trust for her.

Dagneau's evidence is that a short time before the will was made, in November, 1911, he met Esther Dunkley on the street, and she informed him that either she or her mother could draw the money which was then in the bank, and she asked him if he thought it would be safe to leave it there or should she draw it out; and in answer to his inquiry as to who owned the money, she replied: "Of course, it is mother's." She does not deny this, but says she does not remember making the statement.

Dagneau also says that when the testatrix first discussed with him the making of the will of November, a few days before it was made, Mrs. Dunkley wanted her mother to leave some of the money in the bank to her, but that the mother refused. Mrs. Dunkley denies this, however.

As between these two, it is to be considered that Dagneau is a disinterested witness and gave his evidence straightforwardly and candidly, while the evidence of Mrs. Dunkley is self-serving.

Do not these circumstances indicate that Mrs. Dunkley did not believe in the existence of the trust she now sets up, and that she considered the money as belonging to her mother?"

It would, to my mind, be most dangerous to allow a trust to be established on evidence such as has been put forward in this instance.

The further claim of the defendant Esther Dunkley, that she is entitled to the money in the bank by way of survivorship, is based on the happenings in August, 1911. There was then on deposit the sum of $574.71 in the savings department of the Canadian Bank of Commerce at Chatham, in the name of Elizabeth Kenny, the account being numbered K. 68. Elizabeth Kenny was then in St. Joseph's Hospital, Chatham, suffering from bronchitis, and on that day she signed a memorandum in the following words: "Arrange my money in Esther Dunkley's name so she can draw it. Elizabeth Kenny. Chatham, August 18th, 1911."

Esther Dunkley says this memorandum was drawn by her at her mother's dictation, and was signed by her mother, who requested her to take it to the bank and have it arranged so that either could draw it. On the same day she took it to the bank; and, on its being presented to the accountant of the bank, he changed the heading of the deposit account so as to read as follows: "Made joint a/c, August 18th, 1911. Elizabeth Kenny & Esther Dunkley or either;" after which she returned to her mother and told her that either of them could draw it, and that the mother was satisfied. The deposit book remained in possession of the deceased until the time of her death.

Between the 18th August and the death of Elizabeth Kenny, three withdrawals were made from the account: one on the 26th August, for $5, by Esther Dunkley; another on the 20th September, for $5; and a third on the 24th October, for $35; these two being by Elizabeth Kenny.

Esther Dunkley further says that, at the time the memorandum was drawn, the mother said to her: "If anything should happen to me in the hospital, take my money and my furniture and do the best you can with it;" and that the mother requested her to pay her funeral expenses.

During Mrs. Kenny's last illness, the wife of the plaintiff went to the bank and asked the manager if any one could draw the money in the event of Mrs. Kenny's death; but the manager says that the question was a hypothetical one, and he replied something to the effect that executors only could draw the money. He also says that, at that time, he had no personal knowledge of the account.

On the 9th March, less than two weeks after the death of the testatrix, the defendant Esther Dunkley went to the bank

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and drew from the account the full balance then standing, namely, $542.17, and deposited it in the same bank, in a private account in her own name, which she had had there for some months previously. Before this was done, there had been talk of trouble being caused over the ownership of the money, and this had come to the knowledge of the manager of the bank before the money was paid over to Mrs. Dunkley.

Subsequent to the 9th March, and prior to the service of the injunction order, Mrs. Dunkley drew from her account two sums, one of $99 and the other of $245, out of which she says she has paid $88, for her mother's funeral expenses, and $37.25, the accounts of two doctors who attended her mother. Even if the money is found to be hers, she makes no claim for repayment of these sums.

Are these facts sufficient to entitle Esther Dunkley to the moneys on her mother's death? If the claim is to rest on what was said to her by her mother at the time the change was being made in the bank account, i.e., that, if anything should happen to the mother while in the hospital, Esther was to take the money and furniture and do the best she could with it, she cannot succeed, for this would simply amount to an ineffectual attempt at making a testamentary disposition: *Hill* v. *Hill* (1904), 8 O.L.R. 710.

On the other hand, did the signing of the memorandum authorising a change in the bank account so that the daughter could draw on it, give the daughter any right to or ownership in the moneys, either during the mother's lifetime or at her death?

I cannot find in the evidence any expression of intention on the part of the mother so to benefit the daughter, or that the mother intended anything more than to make an arrangement by which, for convenience sake, the daughter could draw the money, the mother at the time being unwell and unable to go to the bank.

In Payne v. *Marshall* (1889), 18 O.R. 488 (cited for the defendants), the defendant had in her possession a large sum of money which her husband had given her, and she went with him to the bank to deposit it; and on a question arising as to the power of withdrawing it in case of the wife's illness, the money, at the suggestion of the banker, was deposited in both their names, subject to withdrawal by either; and it so remained uninterfered with up to the time of the husband's death. It was held that there was a good gift *inter vivos* to the wife. The effect of the decision in that case was that the moneys which were the wife's did not, merely by being deposited in the two names, cease to be the property of the wife. Mr. Justice MacMahon, in delivering the judgment of the Divisional Court, said (at p. 493):—

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There is no doubt the husband could have withdrawn the money and have deposited it to his own credit; but unless the wife after the gift to her made a re-gift or re-transfer of the money to him, his removal of the money from its place of deposit would not deprive the wife of her right to that money and to follow it if it had been deposited to his own credit. The money being put in the husband's name as well as the wife's was not intended in any way to change the rights of the wife in the ownership of the sum deposited, but was merely deposited in that way for the sake of convenience so that it could be drawn upon in the event of the wife's illness.

The present case is not one where the money became the property of the mother and daughter jointly; it was the mother's; and, though the memorandum authorised its being placed in the daughter's name so that she could draw it, it remained the property of the mother, the daughter's powers or rights being limited to the power to draw.

In *Marshall* v. *Crutwell*, L.R. 20 Eq. 328, a husband in failing health told his banker to change his bank account from his own name into the name of himself and his wife, and authorized the banker to honour the cheques of either himself or his wife; from that time until the husband's death, all cheques on the account were drawn by the wife at the direction of the husband, the proceeds being applied by her to household purposes and small sums for her own use; and all sums afterwards paid in by the husband were carried to the credit of the account in the joint name.

Sir George Jessel, M.R., in delivering judgment, held that the change in the bank account was a mere arrangement for convenience, that it was not intended as a provision for the wife, and that on the husband's death she was not entitled to it.

Low v. *Carter* (1839), 1 Beav. 426; *Re Ryan* (1900), 32 O.R. 224, and *Schwent* v. *Roetter*, 21 O.L.R. 112, all cited by the defendants, are distinguishable from the present case in that there was in them an intention on the part of the depositor that the survivor should become entitled to the money.

In *Low* v. *Carter*, 1 Beav. 426, a husband directed a stockbroker to make the purchase of certain stock in the joint names of himself and his wife for the purpose, as he stated to the stockbroker, of making a provision for his wife; there was also evidence that the testator the day before his death said that the property in the bank being in the joint names, he considered it belonged to his wife solely at his decease, and therefore, he had no occasion to leave it to her by his will. By his will he bequeathed to his wife a life interest "in all his property that he was in possession of." It was there held that the stock did not pass. In that case there was a clear intention on the part of the husband, that on his death the stock should belong to his wife.

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In *Re Ryan*, 32 O.R. 224, the husband made the deposit expressly in the name of himself and his wife jointly to be drawn by either or in the event of the death of either to be drawn by the survivor; and there was evidence, too, that the money which went into that account was owned partly by the husband and partly by the wife.

In *Schwent* v. *Roetter*, 21 O.L.R. 112, the depositor transferred money to the joint credit of himself and his daughter to be drawn by either of them. The learned trial Judge there, however, found upon the evidence that the father intended that the money should be at the call of either of them, and that if any were left at his death the daughter was to have it.

No such intention is to be found, however, in the present case. If anything further were necessary to shew that Esther Dunkley did not become entitled to these moneys on her mother's death, it is found in her admission to Dagneau above referred to, that the money was her mother's.

Prior to her mother's death she does not appear to have considered herself in any way interested in the money. On the evidence of Dagneau and from the evident concern which she shewed about the making of the will, it is difficult to understand how she could have believed that she was entitled to it.

I, therefore, find that there was no intention on the part of the mother to make the daughter the owner or part owner of the money, or to give it to her by survivorship; the money continued to belong to the mother, and on her death it became part of her estate.

Then as to the claim against the bank. The memorandum signed by Mrs. Kenny clearly stated that the object of making the change in the bank account was "so that she (the daughter) could draw it," and nothing more. The authority of the bank was limited to doing what this memorandum directed; and, in so far as the bank or its officers or clerks went beyond what was directed, they exceeded the authority given. The bank took upon itself too much when it altered the bank account as it did.

It is a question in my mind whether the daughter would have made any claim to the moneys if the words "joint account" had not been used in altering the account. The use of these words may well have suggested ownership by survivorship to the daughter or some person representing her.

The bank, too, had notice, before any of the money was drawn out, that there was trouble contemplated over the ownership of it; but it disregarded the warning and allowed the money to be transferred into the name of the daughter, and a considerable portion of it to be afterwards drawn by her.

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I think, in the circumstances, the bank, as well as its co-defendant, is liable to the plaintiff for the amount of the deposit (less, however, the sums which Esther Dunkley has paid as the funeral expenses and doctors' bills of the deceased) with interest from the commencement of the action. The defendants are restrained from dealing with these moneys otherwise than to pay them to the plaintiff. Judgment will go accordingly with costs.

Judgment for plaintiff.

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(Decision No. 1.)

Halifax County Court, Nova Scotia, His Honour W. B. Wallace, County Judge, Sitting as an Extradition Commissioner. July, 1912.

1. EXTRADITION (§ I—4)—INTERNATIONAL—STRICT COMPLIANCE WITH TECHNICALITIES OF CRIMINAL PROCEDURE—GOOD FAITH OF APPLICANT.

Where two countries have enacted criminal legislation to prevent a certain crime, in respect of which extradition proceedings are instituted in manifest good faith by one of such countries, too much regard should not be paid by the other country in such proceedings to the ordinary technicalities of criminal procedure; and extradition may be ordered notwithstanding a discrepancy between the date of the alleged offence in the information and the date proved by the evidence.

2. BANKRUPTCY (§ VI—31)—FOREIGN BANKRUPT—FRAUDULENT CONCEALMENT OF ASSETS—UNITED STATES LAW—CONCEALMENT PRECEDING BANKRUPTCY PROCEEDING.

The essence of the offence of fraudulent concealment of assets by a bankrupt under the law of the United States is the continuance of the concealment after adjudication of bankruptcy and the appointment of a trustee, whose title relates back to the date of the adjudication, and extradition will not be refused merely on the ground that the act of concealment is alleged to have taken place before the date of the adjudication.

3. EVIDENCE (§ XII L—995)—SUFFICIENCY OF PROOF TO JUSTIFY ISSUANCE OF A WARRANT OF COMMITTAL FOR EXTRADITION.

The evidence to warrant a committal for extradition need not be such as to justify a conviction at the trial. A *primâ facie* case only need be made.

4. EXTRADITION (§ I—4)—BANKRUPTCY OFFENCE—FRAUDULENT CONCEALMENT OF PROPERTY—CONTINUING OFFENCE.

The offence of fraudulent concealment of property by a bankrupt committed in the United States of America and for which extradition may be had from Canada is a continuing offence which may be begun before the date of the bankruptcy adjudication and continued to completion thereafter.

Statement

HARRY and Copel Webber were charged at Halifax before His Honour Judge W. B. Wallace with offences against the bankruptcy laws of the United States, the former for that he did on the 12th day of December, A.D. 1911, conceal assets from his trustee in bankruptcy, the latter with aiding and abetting

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in said offence. It appeared from the depositions and oral evidence adduced that the fraudulent acts of secretion and removal of goods were committed in October and November, 1911, the bankruptcy proceedings instituted December 12th and the trustee elected March 19th, 1912.

At the close of the case for the United States Government, *Mellish*, K.C., moved for the dismissal of the complaint on the ground that on December 12th, the date charged in the information no trustee had been elected or was in existence and consequently no crime had been committed as charged.

W. J. O'Hearn, contra, contended that the commissioner was not bound by the date of the information or complaint before him, but could commit for any extraditable offence disclosed by the evidence citing Seager's Magistrates' Manual, 1st ed., p. 205, sec. 18 (*a*) Extradition Act; *Re Garbutt* (No. 1), 21 O.R. 179; *United States* v. *Harsha* (No. 2), 11 Can. Cr. Cas. 62; and *Re Gaynor and Green* (No. 11) (1905), 10 Can. Cr. Cas. 154, 160.

JUDGE WALLACE, County Court Judge, ruled that he was not bound by the date in the information but could commit for any extraditable offence disclosed by the evidence.

H. Mellish, K.C., and *J. B. Kenny*, for the fugitives:—In order to warrant commitment for surrender, facts must disclose offence under law of demanding country. Evidence here shews "concealment" done in October and November. This before trustee was appointed. Impossible to commit offence until trustee appointed. See *Cohen* v. *United States*, 157 Federal Reporter, 651, and *Radin* v. *United States*, 189 Federal Reporter 568. They also tendered depositions for the defence.

W. J. O'Hearn, for the United States Government:—The evidence shews the commission of an offence against 29(*b*) United States Bankruptcy Act. The essence of the offence is the *failure* to come forward when the *trustee* is elected and disclose the goods misapplied or the proceeds. Concealment can commence before bankruptcy. See *Cohen* v. *United States*, 157 Federal Reporter, at p. 651. The evidence here shews a *prima facie* case. That is all that is necessary. Any doubt as to the facts must be resolved in favour of surrender. See *Ex parte Feinberg*, 4 Can. Cr. Cas. 270, at 275. Depositions for the defence are not admissible as evidence except in the cases mentioned in sec. 15 of the Extradition Act. See *In re Garbutt* (No. 2), 21 Ont. R. 465.

Judge Wallace.

WALLACE, Extradition Judge:—The charge against the defendant Harry Webber is that on or about the twelfth day of December, 1911, being then a bankrupt in Lawrence, Massachu-

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setts, he did fraudulently conceal from his trustee in bankruptcy certain goods and money belonging to his estate in bankruptcy.

Counsel for the accused contends that there is no evidence to sustain this charge and that, therefore, the accused should be discharged. It appears that the adjudication of bankruptcy did not take place until February, 1912, and that the trustee in bankruptcy was not appointed until March, 1912. It is, therefore, urged that the accused could not conceal goods in December from a trustee who was not appointed until the following March. I consider the information defective, so far as the date of the commission of the alleged offence is concerned, as, in order to commit the offence there must be an existing trustee. But, where Canada and the United States have enacted criminal legislation to prevent a person from defrauding his creditors, by fraudulently concealing any of his property, and where, as in this case, the extradition proceedings are manifestly instituted in good faith by the demanding country, too much regard should not be paid to the ordinary technicalities of criminal proceedings. If the evidence in this case tends to prove the offence as having been committed at a later period than the date alleged in the information I am not justified in dismissing the case because of the defect in the information.

Dealing then, with the law and facts, it appears that under United States law the fraudulent concealment which is a violation of the statute is a continuing offence, and may be begun before bankruptcy and continue to completion after adjudication of bankruptcy. Naturally a bankrupt who intended to commit the fraudulent act would usually make some preparations to that end some time before the adjudication of bankruptcy. A bankrupt who misapplies goods of the estate before the actual adjudication of bankruptcy and fails to come forward subsequently to disclose and turn over such goods or their proceeds to the trustee in bankruptcy, and whose conduct tends to shew that he is hiding the property or its proceeds from the trustee thereby commits acts which might sustain a charge of fraudulent concealment within the meaning of section 29(*b*) of the United States statute. Although a person cannot actually commit this offence until he has been adjudged a bankrupt he may previously contemplate and prepare for the commission of the offence and his acts during that earlier period are admissible in evidence. The essence of the offence is the continuance of the concealment after adjudication of bankruptcy and after the appointment of the trustee, whose title relates back to the date of the bankruptcy adjudication.

Applying the law to the facts in this case I find that there is evidence of a secreting of property before bankruptcy and a subsequent failure to turn over such property or its proceeds

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after adjudication of bankruptcy and after the trustee was appointed, and such evidence tends to sustain a charge of fraudulent concealment within the meaning of section 29(*b*) of the United States bankruptcy law. The requirements of the extradition law having been in other respects fulfilled, and there being sufficient evidence to justify a committal of the accused, a warrant for his committal will be issued.

Certain depositions were tendered by counsel on behalf of accused to explain acts of the accused when carrying on business in Lawrence, Massachusetts. I refuse to receive these depositions as I am not trying the guilt or innocence of the accused, but am merely considering whether the evidence given by the prosecution is sufficient to justify his committal for trial.

In the case against Copel Webber (alias Charles Webber), the charge is that the accused did aid and abet Harry Webber, a bankrupt, in fraudulently concealing from Harry Webber's trustee in bankruptcy certain property belonging to Harry Webber's estate in bankruptcy. If this charge were established by evidence the defendant, under Canadian, as well as United States law, would be guilty, as a principal. The evidence, however, in this case is much weaker than in the case against Harry Webber, and in the trial of a case of this kind exclusively on such evidence the accused would be entitled to be discharged. He is not shewn to have been a partner of Harry Webber, or to have participated in any way in the profits of the business, and some of his acts which, under other circumstances, might tend to shew guilty knowledge are consistent with the acts of an ordinary employee carrying out the instructions of an employer, and not necessarily having any knowledge of any criminal purpose on the part of the employer. But I am not to try the case, and I find that the depositions of Miss Frances Lyons, when combined with the other facts in the case constitutes sufficient evidence to justify the committal of the accused for trial.

Committal for extradition.

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(Decision No. 2.)

Nova Scotia Supreme Court, Ritchie, J., in Chambers. August 9, 1912.

1. EVIDENCE (§ VII H—632)—EXPERT'S OPINION ON FOREIGN LAW—CONSTRUCTION OF FOREIGN STATUTE.

A question as to the law of a foreign jurisdiction is one of fact and not of law, and the Court should therefore accept the opinion of an expert in the foreign law in preference to its own upon the construction of a statute of the foreign jurisdiction.

2. HABEAS CORPUS (§ I C—12*c*)—REVIEW OF EXTRADITION COMMITMENT—FUNCTION OF JUDGE—REASONABLE GROUNDS FOR SUSPICION.

The function of a judge upon the return of a writ of *habeas corpus* in the case of one who has been committed for extradition is not to

sit in appeal from the Extradition Commissioner, but simply to decide whether he had jurisdiction to order the committal, and evidence offering reasonable grounds of suspicion against the accused will be sufficient for a refusal of his discharge.

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THE prisoners were committed for surrender to the United States Government on charges against bankruptcy laws, the former on a warrant accusing him of having between the 1st day of October, A.D. 1911, and the 31st day of March, A.D. 1912, while a bankrupt, concealed property from his trustee in bankruptcy, the latter on a warrant charging him with aiding and abetting in said crime. Drysdale, J., issued a writ of *habeas corpus* and the prisoners were produced before Ritchie, J., in Chambers and the above warrants returned, the evidence being brought before the Judge by *certiorari*.

Argument

H. Mellish, K.C., and *J. B. Kenny*, for the applicants:—There is no sufficient evidence of criminality against the accused. The evidence shews that the suspicious conduct of accused took place in October and November, A.D. 1911. The trustee was not elected until March, 1912. Demanding Government must shew prisoners had goods or money in March, 1912, at time trustee was elected. "Concealment" while possibly begun before bankruptcy must continue after. No evidence of continuation here. See *Cohen* v. *United States*, 157 Fed. Rep. 651; also *Radin* v. *United States*, 189 Fed. Rep. 568; also *Re Adams*, 171 Fed. Rep. 599. If *prima facie* case not made out, *habeas corpus*, Judge will discharge. See *United States* v. *Harsha* No. 1, 10 Can. Cr. Cas. 433. Facts here in both cases do not shew offence under American statute.

W. J. O'Hearn, for the United States Government:—The only question on this application is, was there any evidence before the Commissioner.* The question of its sufficiency cannot be considered. See *R.* v. *Maurer*, 10 Q.B.D. 513; *Ex parte Huguet*, 29 L.T.N.S. 41; *In re Arton*, No. 2, [1896] 1 Q.B. 509; *Ex parte Sibeth*, 51 W.R. 191; *Ex parte Scitz*, No. 1, 3 Can. Cr. Cas. 56, and *United States* v. *Browne*, No. 2, 11 Can. Cr. Cas. 174.

Whether the facts constitute an offence under the American statute is a question of foreign law, and as such is a question of fact for the Commissioner. The Commissioner has accepted the evidence of Mr. Garland the legal expert and found on it. There being evidence to support his finding it will not be disturbed in *habeas corpus*. See *Re Collins*, No. 3, 10 Can. Cr. Cas. 90; Phipson on Evidence, p. 359; *Ex parte Huguet*, 29 L.T.N.S. 41; *Ex parte Piot*, 15 Cox C.C. 213. Relationship is a fact for the jury. See *R.* v. *Chapple and Bolingbroke*, 17 Cox C.C., p. 455.

*The decision of His Honour W. A. Wallace, County Judge, sitting as an extradition commissioner is reported: *United States* v. *Webber*, Decision No. 1, 5 D.L.R. 863.

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Ritchie, J.

RITCHIE, J.:—The offence with which the accused persons are charged is a violation of the United States bankruptcy law.

The statutory enactment in question is as follows:—

> A person shall be punished by imprisonment for a period not to exceed two years upon conviction of the offence of having knowingly and fraudulently concealed while a bankrupt, or after his discharge from his trustee, any of the property belonging to his estate in bankruptcy.

If I had to decide on the true construction of this statute, I would have very great difficulty in holding that the offence could be committed before the accused was put into bankruptcy and before the appointment of the trustee. My opinion is against the construction, but the statute is passed in a foreign jurisdiction and an expert from that jurisdiction has testified that the offence may arise before the bankruptcy arises and before the trustee is appointed. I think that the question of what the law is in a foreign jurisdiction is a question of fact and not a question of law for me, therefore I feel bound to accept the evidence of the legal expert from the United States.

The only remaining question which I have to decide is not whether there is sufficient evidence to convict these men, but is there any evidence against them proper to be submitted to a jury. I have no doubt there is such evidence against Harry Webber; the case against Copel Webber is much weaker, but I cannot say there is no evidence offering reasonable grounds of suspicion. I think there is some slight evidence of this character. I am not sitting as an appeal Judge from Judge Wallace, the learned Extradition Commissioner; my function as I understand it is to decide whether or not he had jurisdiction to make the order. After a careful consideration of the evidence, I am of opinion that there was jurisdiction to make the order, and therefore refuse the application for discharge.

Discharge refused.

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O'TOOLE v. FERGUSON.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., and Meagher and Russell, JJ. January 19, 1912.

1. CONTRACTS (§ III B—200)—DEFENCES—RIGHT OF CONTRACTOR TO SET UP AS DEFENCE PROHIBITION AGAINST SUB-LETTING—RIGHT OF SUB-CONTRACTOR.

> It is no defence to an action by a sub-contractor, against the contractor on a bill of exchange and two promissory notes given by the contractor for work done by the sub-contractor in connection with a portion of the contract, that the original contract with the Crown entered into by the contractor, contained a stipulation "that the parties of the first part shall not in any way dispose of, sub-let, or re-let any portion of the work imbodied in this contract."

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Statement

PLAINTIFF's claim against defendant was first as acceptor of a bill of exchange for $110, drawn by plaintiff upon defendant, payable 30 days after date at the Royal Bank of Canada, Halifax, where the same was duly presented for payment and dishonoured. Second and third, as maker of two promissory notes for $350 and $500 respectively, payable to the order of plaintiff at the Royal Bank of Canada, Dartmouth, where the same were presented for payment and dishonoured.

The defence pleaded was as follows:—

1. As to the first, second and third paragraphs of the statement of claim, the defendant says that the consideration for each of the said notes was and is illegal and contrary to public policy, and the said notes were made and given under these facts and circumstances:—On the 17th day of October, A.D. 1910, the defendant entered into a contract under seal with His Majesty King George V. represented therein by the Honourable Louis Phillipe Brodeur, Minister of Marine and Fisheries of the Dominion of Canada, to erect a new steel deck house on the C.G.S. "Minto," and also to fit up on board the said steamer, a teak deck house, taken from the C.G.S. "Stanley," the whole work to be completed within twenty-four days from the date of the said contract. It was a term of the said contract known to the plaintiff or alternatively, if not so known to the plaintiff, that the defendant should not in any way dispose of, sub-let or re-let any portion of the work embraced in the said contract. The plaintiff made a sub-contract with the defendant to do a portion of the work embraced in the said contract and the plaintiff did the said work which was embraced in the sub-contract and which work was the consideration for the making by the defendant, of the promissory notes sued on herein and by reason of the said contract the said sub-contract was and is illegal, and is contrary to public policy, and the plaintiff is thereby precluded from recovering for work done under the same, or on the said notes, or at all.

2. As to the 4th paragraph of the statement of claim, the defendant says:—

(*a*) That he repeats the facts and circumstances set out in paragraph 1 of this defence, which allege that the consideration for the said notes is illegal and says that by reason thereof the plaintiff is precluded from recovering in this action for the said work.

(*b*) That the price for said work and labour is exorbitant and excessive.

(*c*) The materials were not provided, or any of them.

(*d*) Section 6 of the Sales of Goods Act has not been complied with.

There was a counterclaim for rent and for breach of the sub-contract by failure to complete the same in time.

On motion before Drysdale, J., in Chambers, on notice, to set aside the defence pleaded and to enter judgment for plaintiff on the ground that said defence was false, frivolous and vexatious, and disclosed no answer to the statement of claim, affidavits were read which in the opinion of the learned Judge

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Drysdale, J.

supported plaintiff's contention, and judgment was given as follows:—

DRYSDALE, J.:—I am of opinion paragraph one of the defence is bad in law and discloses no defence to this action.

Paragraph 2 in so far as it repeats paragraph 1, is also bad, and as to sub-paragraph "*b*" and "*c*," I think they must under the affidavits read, be set aside as false and vexatious pleas.

Holding this opinion the plaintiff is in my view entitled to enter judgment on the statement of claim for the amount sued upon.

The counterclaim will go over for trial.

From this judgment defendant appealed.

The appeal was dismissed with costs.

Argument

J. J. Power, K.C., in support of appeal. The case should have been allowed to go to trial without striking out the defence: An. Pr. (1912), pp. 398 to 401; Jud. Act, O. 25, rr. 2, 3, 4; *Hubbuck* v. *Wilkinson*, [1899] 1 Q.B. 86; *Jacobs* v. *Booth's Distillery Co.*, 85 L.T.R. 262.

Defendant had no power to sub-let the contract. It was a contract with the Crown with an express stipulation that it was not to be sub-let. It was therefore against public policy to sub let, or to get someone else to perform the contract: *Blackford* v. *Preston*, 8 Term R. 89; *Card* v. *Hope*, 2 B. & C. 661.

H. Mellish, K.C., contra. The defence is bad on the face of it. It would be against public policy if defendant could not sub-let part of his contract.

Power, K.C., replied.

The judgment of the Court was delivered by

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J., who dismissed the appeal, holding that the breach of the clause in the contract made between the Crown and defendant, against sub-letting any portion of the contract, did not invalidate the contract made between plaintiff and defendant or preclude the plaintiff from recovering upon it, such clause being merely inserted for the purpose of enabling the Crown to cancel the contract with defendant in the event of violation of its terms, or to refuse payment for the work done under it.

Appeal dismissed with costs.

KINSMAN v. KINSMAN.

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Ontario High Court. Trial before Riddell, J. April 3, 1912.

1. CANCELLATION OF INSTRUMENTS (§ I—6)—PROMISSORY NOTE—SIGNATURE—SCHEME IMPRACTICABLE AND VISIONARY—ABSENCE OF ANY BENEFIT.

Where a signature to a promissory note, antedated and overdue at the time of signing, has been obtained from a person unaccustomed to business affairs by a representation that the giving of the note is part of a scheme to obtain by legal proceedings a sum of money for a company in which the maker is a shareholder, and, though there was no intention on the part of the payee to defraud, the scheme and proceedings were in fact visionary and impracticable, and the maker received no benefit from the giving of the note, the Court may order the payee in whose hands it remains to deliver it up for cancellation.

2. CONTRACTS (§ V C 3—402)—RESCISSION OF CONTRACT—MISREPRESENTATION—ABSENCE OF FRAUD—EXECUTED OR EXECUTORY CONTRACT.

An executed contract induced by misrepresentation cannot be set aside unless the misrepresentation be fraudulent, but this rule does not extend to executory contracts.

[*Angel* v. *Jay*, [1911] 1 K.B. 666; *Abrey* v. *Victoria Printing Co.*, 2 D.L.R. 208, 3 O.W.N. 868; *Reese River Co.* v. *Smith*, L.R. 4 H.L. 64; *Adam* v. *Newbigging*, 13 App. Cas. 308, and *Angus* v. *Clifford*, [1891] 2 Ch. 449, specially referred to.]

3. EVIDENCE (§ II E 7—186)—BURDEN OF PROVING FRAUDULENT INTENT.

Fraudulent intent must be proved in an action for deceit.

[*Smith* v. *Chadwick*, 9 A.C. 157, at p. 190; *Derry* v. *Peek*, 14 A.C. 337, and *Tackey* v. *McBain*, [1912] A.C. 186, followed.]

Statement

Two actions arising out of the same transactions in regard to a sale of company-shares, an agreement to repurchase, and promissory notes signed, in the circumstances set out below. There were also counterclaims in both actions.

S. F. Washington, K.C., for the plaintiff in the first action.

W. M. McClemont, for the defendants in the first action and the plaintiffs in the second action.

S. F. Washington, K.C., and *A. Weir*, for the defendants in the second action.

Riddell, J.

RIDDELL, J.:—R. E. Kinsman had a business in Hamilton which he turned into a joint stock company. A relative of his, a dentist in Sarnia, Homer Kinsman, was asked by R. E. Kinsman to take some stock in the company. Homer Kinsman had no money, but his wife, Maria Kinsman, had. R. E. Kinsman and his wife, Emily Kinsman, went to Sarnia and endeavoured to induce Maria Kinsman to take stock. She offered, instead, to lend money on a mortgage upon property in Hamilton owned by Emily Kinsman. Finally, Emily Kinsman agreed that, if Maria Kinsman would take stock in the company, she and her husband would take it from her at any time she wished and repay her her money. Maria Kinsman did take in all $3,500 stock.

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KINSMAN v. KINSMAN

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While the company was a going concern, Maria Kinsman demanded her money, first for $1,000 stock. R. E. Kinsman sent her a note for $1,000, saying that his wife was too ill to sign it. This was not satisfactory, and the whole amount was demanded. The Hamilton Kinsmans had difficulty in raising the money, and did not pay. The company failed.

It came to the knowledge of Homer Kinsman that R. E. Kinsman had paid the bank on his own debt some $13,000 of the company's money, which with interest would amount to about $18,000 at the time of the transactions in question in these actions. He thought it would be a good scheme for the company to sue the bank to recover this $18,000, and also to buy in the assets of the company for the benefit of the shareholders. He thought that, if his wife had security for her $3,500, she would help him financially in the purchase of these assets. He was afraid, too, that some creditor would attach the property of Emily Kinsman. He had read some law-book, and became filled with the idea of a *lis pendens*—he was his own lawyer, with the proverbial result.

He came to Hamilton full of his scheme, and went to the house of Emily Kinsman. There meeting R. E. Kinsman, her husband, he asked to see Emily Kinsman, but refused to discuss matters with the husband at all. At length being admitted to her room, he launched out into a statement that he had a scheme whereby $18,000 could be realised for the shareholders, and asked Emily Kinsman to sign a note for $2,500 for the stock, and also to put her name on the note for $1,000 which her husband had already given. I have no doubt whatever that what he said led her to understand that the giving of the notes was part of the scheme to realise the $18,000. He had the new note dated back so as to be due before the day upon which it was signed, explaining that this was to enable him to register a lis pendens on her property and to get in ahead of other creditors. I do not think that Homer Kinsman had any intention to defraud Emily Kinsman or any one else; but I think he, in a muddled sort of way, did not distinguish between his two projects and objects—one to get security for his wife's debt from Emily Kinsman and the other to recover back money from the bank for the benefit of all concerned. I do not think, even at the trial, he had these two matters disentangled in his own mind.

By similar representations, he procured the signature of E. Palmer Kinsman, son of R. E. and Emily Kinsman, to the new note. Having secured the signatures of mother and son, he went away. Shortly after, these signatures were repudiated.

In all the transactions (from the conduct and demeanour of the witnesses) the evidence of Homer Kinsman and his wife, Maria Kinsman, is to be fully believed—the recollection of E. Palmer Kinsman is not to be relied upon.

Maria Kinsman brings action upon the note for $2,500 against Emily Kinsman and her son. They counterclaim for cancellation of the notes. Emily Kinsman and her son also bring action against Homer Kinsman and his wife for cancellation of the notes; Maria Kinsman counterclaims for the face value of the stock, which she contends (and, as I find, rightly contends) Emily Kinsman agreed to pay her for.

Both actions were tried before me at Hamilton.

In the view I take of the case, the notes must be cancelled, except so far as the signature of R. E. Kinsman to the $1,000 note is concerned.

There was, indeed, no fraud on the part of Homer Kinsman, nor was there any threat of criminal prosecution, nor anything in the way of wilful misrepresentation such as is stated in the pleading; but there is no doubt, I think, that he represented the taking of the notes as an integral part of the scheme for securing $18,000 for the shareholders.

Of course, fraud—fraudulent intent—must be proved in an action for deceit: *Derry* v. *Peek* (1889), 14 App. Cas. 337; *Smith* v. *Chadwick*, 9 App. Cas. 157, 190, a principle which has been reiterated by the Judicial Committee in *Tackey* v. *McBain*, [1912] A.C. 186. And an executed contract induced by misrepresentation cannot be set aside unless the misrepresentation be fraudulent: *Angel* v. *Jay*, [1911] 1 K.B. 666, and cases cited; *Abrey v. Victoria Printing Co.* (1912), 2 D.L.R. 208, 3 O.W.N. 868. But the rule does not extend to executory contracts: *Reese River Co.* v. *Smith* (1869), L.R. 4 H.L. 64; *Angus* v. *Clifford*, [1891] 2 Ch. 449; *Adam* v. *Newbigging* (1888), 13 App. Cas. 308.

E. Palmer Kinsman, is consequently relieved from liability; but Emily Kinsman should pay the amounts for which Maria Kinsman counterclaims.

There will be no costs to any party.

Judgment accordingly.

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MEMORANDUM DECISIONS.

Memoranda of less important Cases disposed of in superior and appellate Courts without written opinions or upon short memorandum decisions and of selected Cases decided by local or district Judges, Masters and Referees.

MOLSONS BANK v. HOWARD.

County Court County of Grey, Widdifield, Co. C.J. February 12, 1912.

BILLS AND NOTES (§ I A—2)—*What are—Document in writing—Conditional sale of implement—Absence of absolute and unconditional promise.*]—The plaintiff sues upon a note in the words following:—

"$25.00. Toronto Junction, March 23, 1910.

"On or before the first day of March, 1911, for value received, I promise to pay to the Wilkinson Plough Co. Limited, or order, at their office in Toronto, the sum of twenty-five dollars, with interest at ten per cent. per annum after maturity till paid. I further agree to furnish security satisfactory to you at any time, if required. If I fail to furnish such security when demanded, or if I make any default in payment, or should I dispose of my landed or personal property, you may then declare the whole price due and payable, and you may retake possession of the implement without process of law, and sell it to pay the unpaid balance of the price, whether due or not. Subject to the aforesaid provisions, I am to have possession and use of the implement at my own risk, but the title thereto is not to pass to me until full payment of the price, or any obligation given therefor. These conditions and agreements are to continue in full force until the full payment of the price is made."

It is admitted that the defendant is the maker of the note; that the plaintiffs became the holders thereof before maturity, for value, in good faith and without notice of any defect in title; that the defendant paid the note to the Wilkinson Plough Company, without any notice that the note had been assigned to the plaintiffs; and that the money was never paid to the plaintiffs. Upon these facts, if the document is a negotiable promissory note, the plaintiffs are entitled to judgment; if it is not a negotiable promissory note, the plaintiffs cannot recover.

The plaintiffs contend that the document is a negotiable promissory note, and that the case is not governed by the decision in *Dominion Bank* v. *Wiggins*, 21 A.R. (Ont.) 275.

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In *Dominion Bank* v. *Wiggins*, 21 A.R. (Ont.) 275, the Court held that the following words, "The title and right to the possession of the property for which this note is given shall remain in Haggart Bros. Manufacturing Co. until this note is paid," added to the note there sued on, had the effect of rendering the document unnegotiable as a promissory note. The Court points out that, although the consideration for the note is the sale of the property, the maker has neither the title nor the right of possession thereto until the note is paid; and, unless the payee was in a position to deliver the possession of and title to the machine sold when the note matured, the purchaser was not compellable to pay, "and the payment to be made is therefore not an absolute unconditional payment at all events, such as is required to constitute a good promissory note."

In the present case, by the terms of the note, the defendant has the possession of the implement, and it is argued that, he having the possession and the right of possession, the title would pass to him automatically upon payment of the note, and that the hardship to which the maker is exposed in the Wiggins case could not happen here. Undoubtedly the Court laid considerable stress upon the fact that the defendant in the Wiggins case did not get either the title or possession, and that much of the reasoning proceeds upon that basis; and, if the absence of both title and right of possession was the determining factor, that is decisive as far as this case is concerned. I am, however, of the opinion that the right to possession of the machine for which the note was given remaining in the vendors, was not necessary to the decision in *Dominion Bank* v. *Wiggins*, 21 A.R. (Ont.) 275.

It is to be noted that, although the defendant in this case was "to have possession and use of the implement," such possession was not an absolute one, but might be revoked upon his failing to furnish security or on a sale of his property. In this respect the note is very like that in *Third National Bank* v. *Armstrong*, 25 Minn. 530, where the title to the implement for which the note was given remained in the vendors, and they had "the right to take possession of said property wherever it may be found, at any time they may deem themselves insecure, even before the maturity of this note." The judgment was on an appeal from the trial Judge; and, because it disposes, very briefly, of the questions raised in the plaintiffs' argument, will stand quoting in full:—

"It appears upon the face of the instrument that the defendant's obligation to the Williams Mower and Reaper Company, the assignor of the plaintiff, was upon the sole condition and consideration that the reaper therein mentioned as belonging to the company, the possession of which was conditionally delivered to him, should, by a proper transfer of title from the company, become his absolute property, whenever and as soon

as the said obligation was fulfilled in accordance with the terms of the contract. It is also expressly provided that the title and ownership of the reaper should remain in the company until full payment of the so-called note and interest, and that the delivery of the property at the time was subject to this condition, and to the right of the company to retake possession at any time it might deem itself insecure. Defendant's promise, therefore, was not an absolute and unconditional one to be kept in any event; for it depended upon the contingency of an observance by the company of the sole condition on which it rested, that an absolute transfer of the property with good title would be made whenever the promise was performed. The promise of payment and the implied obligation to transfer the title were mutual; and, as each was the sole consideration for the other, and both were to be performed at the same time, they were concurrent conditions of the same agreement, in the nature of mutual conditions precedent, so that inability or refusal to perform one would excuse performance as to the other: Benjamin on Sale, pp. 451, 580. If, prior to any default on the part of the defendant, the company had retaken possession of the property and disposed of it, so that, upon the maturity of the defendant's obligation, an observance of the condition on its part had become impossible, there can be no doubt that, under such circumstances, no action could have been maintained against him upon his promise. An obligation of this character is altogether too uncertain to serve the purpose of commercial paper as the representative of money in business transactions. It carries into the hands of every holder notice of the existence of a condition that may result in defeating any recovery upon it, and, therefore, cannot have afforded to it the privileges attaching to that kind of paper."

This judgment is quoted and approved of by Hagarty, C.J.O., in *Sawyer* v. *Pringle*, 18 A.R. (Ont.), at p. 224, and by Maclennan, J.A., in *Dominion Bank* v. *Wiggins*, 21 A.R. (Ont.), at p. 278, and appears to me to be conclusive in the defendant's favour.

The action will be dismissed with costs. J. O. Dromgole, for the plaintiffs. T. H. Dyre, for the defendant.

CITY OF REGINA v. SHARLEY.

Police Magistrate's Court, Regina, Sask., Mr. Trant, P.M. August 22, 1912.

HEALTH (§ III A—10)—*Regulation to protect—Municipal by-law fixing percentage of butter fat in milk ultra vires—Dominion Adulteration Act.*]—On the 16th day of August, 1912, J. W. Sharley was before me charged on the oath of the Medical Health Officer for the city of Regina, in the Province of Saskatchewan,

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that on the 19th day of July, 1912, at the city of Regina aforesaid, he did have in his possession, care, custody or control, milk which contained less than the required standard of butter fat, to wit: 3 per cent., the said standard being 3. 5 per cent., contrary to sec. 23 of by-law 411 of the city of Regina. The sanitary inspector stated in his evidence that the accused was a licensed dairyman and that he had taken milk from his cans that the Babcock tester shewed to contain less than 3.5 per cent. butter fat.

Mr. Embury, for the defence, raised two points: First, that the printed copy of the license put in shewed that the license only extended from the 1st day of January, 1911, to the 31st December, 1911; secondly, that the by-law was *ultra vires*, the legislation governing the quality of milk being the Dominion Adulteration Act, which did not give power to any municipality to make such a by-law as that under which these proceedings were taken.

I adjourned the hearing until the 22nd day of August, 1912, to examine the objections. On the said date I do rule on the points as follows:—

First: as regards the copy of the license. The wrong date is so obviously a printer's error that, extending the principle of the old maxim *Falsa orthographia non vitiat cartam*, and seeing that evidence was given that the accused is a licensed dairyman, I have no hesitation in overruling the objection.

Secondly: the section of the by-law under which the summons was issued is as follows:—

> No person or corporation licensed under this by-law shall keep, sell, offer for sale, convey or deliver, or have in his or its possession, charge or control any milk in the city if such milk contains more than 88 per cent. of watery fluids or less than 12 per cent. of total solids or less than 3.5 per cent. of butter fat.

I cannot understand where the city council obtained authority to make such a by-law. There is no such power under provincial legislation neither in the City Act nor in the Public Health Act. This is not accidental as doubtless the provincial Legislature recognised that such authority would be *ultra vires*.

The quality of milk is not a local question. Milk is consumed over the whole of the Dominion of Canada and the regulations respecting its quality are provided by Dominion legislation. That legislation is precise and it directs the procedure which is quite different from the procedure taken in this case. In the first place the Adulteration Act provides for the distribution of the samples taken and it also enacts that the analysis shall be made, not by the inspector, but by an analyst. There are other provisions, not one of which was obeyed in the present instance. This legislation, I repeat, is in the Dominion Adulteration Act and under that Act alone proceedings can be taken. I have therefore to declare that the section of the by-law under which

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these proceedings were taken is *ultra vires*, the field being covered by Federal legislation, namely, the Dominion Adulteration Act.

I am aware that it has been decided that when the question of *ultra vires* is raised if the by-law is enacted in good faith it should not be set aside unless it is proved to be so unreasonable, unfair and oppressive as to be a plain abuse of the powers conferred upon a municipal council. The present case is not within such rulings. Anyone who reads over the Dominion statute will see that it would be unreasonable, unfair and oppressive to confer such a power upon a municipality, as in that case every municipality might have a different standard for the quality of milk. Whereas under the Dominion statute the standard is fixed by the Governor-General in Council.

In declaring this section of the by-law *ultra vires* I am supported by the great case of *The King* v. *Russell*, 5 Privy Council Cases 77; *Rex* v. *Garvin*, 7 W.L.R. 783; *Regina* v. *Stona*, 23 O.R. 46; *Rex* v. *Ferris*, 15 W.L.R. 331, and other cases.

There is no occasion, therefore, for the accused to be put on his defence, and I do dismiss the case.

H. J. Foik, for the city.

J. F. L. Embury, for the defence.

QUEBEC BANK v. SOVEREIGN BANK OF CANADA.

(Decision No. 1.)

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Ontario High Court. Trial before Britton, J. September 11, 1912.

GUARANTY (§ I—6)—*Debt of insolvent company—Duration of liability — Bank Act — Securities — Payment for timber.*] — Action for recovery by the plaintiffs from the defendants of the price (agreed on, as alleged) of 3,934 cords of spruce at $6 per cord, delivered by the plaintiffs to the Imperial Paper Mills of Canada Limited, during the months of July, August, and September, 1907. BRITTON, J., in a written opinion, made a full statement of the circumstances in which the agreement was arrived at and of the other facts and circumstances of the case, and set out the correspondence between the parties. The defences pleaded were: (1) that the agreement relied on by the plaintiffs was merely a guarantee of the defendants that they would pay a debt to be incurred by the receivers and managers of the Imperial Paper Mills Company, and that no such debt had been incurred; (2) that, as against any such debt or liability by the receivers and managers, they had, and the defendants in this action had, the right to contend that the securities which were taken by the plaintiffs from the company were inoperative by reason of a trust deed by the company to

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secure certain debenture-holders, and also that these securities were invalid by reason of non-compliance with the Bank Act; and (3) that, of the logs actually delivered by the plaintiffs to the company, 3,000 cords at least were the property of the defendants, and not of the plaintiffs. Upon considering the plaintiffs' claim and these defences, and upon his view of the facts, the learned Judge pronounced in favour of the plaintiffs for the recovery of $20,932.45, with costs. F. E. Hodgins, K.C., and D. T. Symons, K.C., for the plaintiffs. J. Bicknell, K.C., and W. J. Boland, for the defendants.

INGLIS v. RICHARDSON.

Ontario High Court, Cartwright, M.C. September 12, 1912.

DISCOVERY AND INSPECTION (§ IV—20)—*Sale of Wheat—Destruction by Fire—Loss, by whom Borne—Property Passing—Scope of Examination—Relevancy of Questions—Former Dealings between Parties.*]—Motion by the defendants for an order requiring the plaintiff to attend for re-examination for discovery and answer questions which he refused to answer upon the original examination. The plaintiff bought from the defendants and paid for 4,000 bushels of wheat, of which only 1,000 bushels were delivered. The plaintiff received from the defendants orders on the agent of the Canadian Pacific Railway Company at Owen Sound to deliver the 4,000 bushels to the plaintiff, out of the defendants' wheat in the railway company's elevator; but only 1,000 bushels had been delivered when the elevator was burnt and all the defendants' wheat was destroyed. The plaintiff sued for the price paid by him for 3,000 bushels. The point for determination was, whether the loss was to be borne by the plaintiff or the defendants—whether the property had passed to the plaintiff or was still in the defendants. The plaintiff declined to answer questions as to former dealings with the defendants, and as to whether he paid storage or any other charges to the railway company for storing the grain or otherwise, and other questions bearing on the usual course of dealing. In their statement of defence, the defendants said that the sales out of which the action arose were made according to the usual and ordinary practice followed by them in their business dealings with the plaintiff—setting out the practice correctly, as was admitted by the plaintiff. The Master referred to Benjamin on Sale, 5th Eng. ed., pp. 310, 338, 339, and said that the defendants should be allowed to have discovery from the plaintiff of all facts which *might* (not necessarily which *must*) assist their contention that the property had passed to the plaintiff before the fire. It would seem useful to know, *e.g.*, whether

the plaintiff paid storage; whether he delivered the defendants' orders to the agent at Owen Sound or kept them; whether he had any insurance on the wheat; whether he had pledged it; and other similar matters. It seemed to be a case in which the principle of Con. Rule 312 should be followed, and that the scope of discovery should not be narrowed on either side, so, as far as practicable, "to secure the giving of judgment according to the very right and justice of the case." Order made directing that the plaintiff attend at his own expense for re-examination and answer questions as indicated. Costs to the defendants in the cause. W. N. Tilley, for the defendants. C. A. Moss, for the plaintiff.

CHAPMAN v. McWHINNEY.

Ontario High Court, Cartwright, M.C. September 16, 1912.

PLEADING (§ IX—111)—*Inconsistency with Endorsement on Writ of Summons—Amendment—Validation of Pleading—Costs.*]—The endorsement on the writ of summons was for commission on a sale of one property and exchange of another as part of the consideration of $22,000—giving the following particulars: To commission at 2½% $7,375; to commission on exchange 2½% $550: total $7,925. In the statement of claim the transactions between the parties were set out, and it was said that 2½ per cent. was only half the usual rate, which the plaintiff had agreed to accept in consideration of a promise by the defendant to place the property in question with him for resale. The plaintiff, therefore, asked: (1) payment of $7,925; (2) damages for loss of sale as agreed by the defendant; (3) or, in the alternative, for $15,750, being commission at the usual rate of 5 per cent. The defendant moved to strike out these two latter claims and the corresponding parts of the statement of claim as being inconsistent with the endorsement on the writ. The Master said that the cases under Con. Rule 244 were few; and the inclination of the Court was not to give it a very wide application: Muir v. Guinane, 7 O.W.R. 54, 158; Nicholson v. Mahaffy, 8 O.W.R. 685. The only substantial question here was one of the costs, as, if necessary, the plaintiff would have leave to amend. It was, perhaps, going a little beyond the scope of Con. Rule 244 to ask in the statement of claim for double the amount claimed in the writ; though, as the defendant was resisting the smaller amount, he was not likely to submit to the larger. Had the writ asked for damages for breach of contract in addition to the sum of $7,925, there would have been no ground for this motion—nor if no sum had been named. As it was, the best disposition of the case was to dismiss the motion, and let the defendant have full time to plead—

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validating the statement of claim as of this date. The costs should be to the defendant in the cause, as the motion was not uncalled for. J. R. Roaf, for the defendant. J. P. Crawford, for the plaintiff.

DAVIDSON v. PETERS COAL CO.

(Decision No. 2.)

Ontario Divisional Court, Falconbridge, C.J.K.B., Britton and Riddell, JJ. September 16, 1912.

EXPLOSIONS AND EXPLOSIVES (§ II D—20)—*Injury to Servant—Use of Explosives—Unguarded Receptacle—Findings of Fact of Trial Judge—Appeal.*]—Appeal by the plaintiff from the judgment of MULOCK, C.J.Ex.D., 2 D.L.R. 908, 3 O.W.N. 1160. The Court dismissed the appeal with costs. T. J. Blain, for the plaintiff. A. J. Anderson, for the defendants.

UNION BANK OF CANADA v. McKILLOP.

Ontario High Court, Cartwright, M.C. September 21, 1912.

JUDGMENT (§ I F—45)—*Con. Rule 603—Action on Guaranty — Proof of Amount Due — Reference.*] — Motion by the plaintiffs for summary judgment under Con. Rule 603 in an action on a guaranty. The Master said that the cross-examination of the defendant's officer on his affidavit in answer to the motion, did not seem to put the case any higher for the defendant than in the similar case of Sovereign Bank v. McPherson, 14 O.W.R. 59. An order should go as in that case, if the defendant really wished to have the exact amount due on the guaranty ascertained and formally proved, either on a reference or at a trial. Costs in the cause. D. C. Ross, for the plaintiffs. Featherston Aylesworth, for the defendant.

McVEITY v. OTTAWA CITIZEN CO.

Ontario High Court, Cartwright, M.C. September 21, 1912.

COSTS (§ I—14)—*Libel — Insolvent Plaintiff — Libel Involving Criminal Charge—Report of Proceeding before Magistrate—Animus—Implication.*]—Motion by the defendants for security for costs in an action for libel. The motion was supported by an affidavit that there was an unpaid execution in the hands of the Sheriff of Carleton against the plaintiff for over $1,000. This was not in any way controverted. The motion was, however, resisted on the ground that the alleged libel involved

a criminal charge. This was based on the fact that the opening words of the report in the defendants' newspaper were as follows: "City Solicitor was exonerated. Was alleged to have entered the premises. Despite the fact that sec. 61 of the Criminal Code of Canada allows (sic) that any trespasser resisting an attempt to prevent his entry into or on to property that is not his own is guilty of an act of assault, Deputy Magistrate Askwith dismissed an alleged case of assault, Saturday, against City Solicitor McVeity, when there was evidence produced to shew that he had used force in an attempt to gain admittance to property other than his own." Thereafter sec. 61 was set out in full, and the evidence taken before the magistrate, the whole report covering three typewritten pages. It was argued that, as it appeared from the report itself that the charge had been dismissed, the words "Despite the fact," etc., could not be said to involve a criminal charge. The Master said that, whatever might be finally decided on this point, in view of the late case of Duval v. O'Beirne, 3 O.W.N. 513, and the authorities there cited, that question must be left to the jury. It might be thought that the animus of the whole report implied that, in the opinion of the writer, the magistrate should have convicted—and this might be held to imply a criminal offence—"despite the fact that the charge was dismissed." It seemed to be at least arguable that if, after an acquittal, e.g., for murder, a newspaper was to state that this was a gross miscarriage of justice, the accused could support an allegation that this involved a criminal charge against him—unless the fact of acquittal was conclusive, because there could not be any further proceedings in the matter. In Routley v. Harris, 18 O.R. 405, it was held that the allegation of an offence punishable by imprisonment, and not merely by a fine, involved a criminal charge. An assault is punishable by imprisonment, in the discretion of the Court or magistrate. In some cases it might be the only appropriate and adequate punishment. See Odgers; Broom's C.L., p. 307; and Criminal Code, sec. 291, which allows imprisonment for two months with or without hard labour, even on a summary conviction for common assault. Motion dismissed; costs to be costs in the cause, the point being new. H. M. Mowat, K.C., for the defendants. J. T. White, for the plaintiff.

JENKINS v. McWHINNEY.

Ontario High Court, Cartwright, M.C. September 30, 1912.

LIS PENDENS (§ I—1)—*Defective endorsement — Statement of Claim—Refusal to Sign "Option" of Purchase of Land—Vacating Registry of Certificate.*]—On the 16th August, 1912,

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the plaintiff began this action. By the endorsement of the writ of summons, the plaintiff's claim was stated to be for a commission on the sale of lands, and for a certificate of lis pendens against the lands, i.e., as to the interest of the defendants or either of them in the east half and north-westerly quarter of lot 6 in the 2nd concession west of Yonge street, in the county of York, and in lots 20 to 61, both inclusive, on plan 1480 in the registry division of East Toronto. The plaintiff having obtained and registered a certificate of lis pendens, the defendants moved to vacate the registry. The notice of motion was served on the 25th September, 1912. On the 27th September, the plaintiff delivered a statement of claim, in which, after setting out the facts on which the claim to commission was based, he alleged, in paragraph 10, that the defendants agreed to give the plaintiff "a ten-day option" (running from the 1st August) "to sell the balance of the farm, and a letter was drawn up to that effect, which the defendant McWhinney took possession of and agreed to sign and have the defendant Radford sign and hand over to the plaintiff, which was not so handed over." In paragraph 11, a refusal by the defendants to sign this "option" was alleged. Nothing was said as to any similar agreement in respect of the East Toronto lots. Besides the claim for commission, the plaintiff claimed damages for refusal to deliver written option agreed on. The Master referred to Brock v. Crawford, 11 O.W.R. 143; Sheppard v. Kennedy, 10 P.R. 242, at pp. 244, 245; Burdett v. Fader, 6 O.L.R. 532, 7 O.L.R. 72; and said that, even assuming that a certificate of lis pendens issued on a defective endorsement could be rehabilitated by a sufficient allegation in the statement of claim, there was here at most nothing definite or precise as to what "the balance of the farm" was—it was nowhere stated in the pleading what quantity of land there was in the lot in question. In no possible circumstances could the facts as set out in the pleading give any right to the plaintiff in respect of the lands. Order made vacating the registry with costs to the defendants in any event. J. R. Roaf, for the defendants. J. J. Hubbard, for the plaintiff.

CUMMING v. CUMMING.

Ontario High Court. Trial before Latchford, J. September 30, 1912.

DEED (§ II F—65)—*Action to Set aside—Parent and Child.*]—Action by a mother against her son to set aside a quit-claim deed of a farm and for other relief. The learned Judge, after discussing the evidence and an attempted settlement, said that, on the evidence, the claim to set aside the deed and the other claims made in the action entirely failed; and he had no power

to deal with the question of contributions from her children for the plaintiff's support during her declining years. Action dismissed without costs. E. F. Lazier, for the plaintiff. S. F. Washington, K.C., and J. W. Lawrason, for the defendant.

BARBER v. ROYAL LOAN AND SAVINGS CO.

Ontario High Court, Cartwright, M.C. October 1, 1912.

INTERPLEADER (§ II—20)—*Want of Neutrality—Architects' Commission.*] — Motion by the defendants for leave to pay into Court a sum admitted to be due either to the plaintiff or to Chapman and McGiffin, and for an order in the nature of an interpleader. The plaintiff sued for $1,000 for services as architect. The defendants admitted that $923.05 was due as architects' fees in respect of a building erected for them, and this was claimed by Chapman and McGiffin, to whom the defendants had already paid $925, without the plaintiff's consent. It appeared that both the plaintiff and Chapman and McGiffin were actually employed upon the work. The defendants disclaimed any agreement or arrangement with the plaintiff, asserting that the plaintiff's connection with the building was through the other architects. The Master said that it was not a case for interpleader; the defendants did not stand neutral, but recognised Chapman and McGiffin, and disclaimed any relation with the plaintiff. The Master referred to Re Scottish American Co. and Rymal, 14 O.W.R. 685; Re Smith and Bennett, 2 O.W.R. 399; Re Elgie Edgar and Clemens, 8 O.W.R. 33, 299; Elgie & Co. v. Edgar, 8 O.W.R. 307; Elgie v. Edgar, 8 O.W.R. 944, 9 O.W.R. 614. Motion dismissed; costs to the plaintiff in the cause; costs to Chapman and McGiffin forthwith after taxation. O. H. King, for the defendants. Grayson Smith, for the plaintiff. G. H. Kilmer, K.C., for Chapman and McGiffin.

ARMES v. MANCIL.

Ontario High Court. Trial before Latchford, J. October 4, 1912.

MASTER AND SERVANT (§ I C—10)—*Architect—Preparation of Plans and Specifications—Remuneration—Evidence—Agency—Ratification.*]—Action by an architect to recover from the defendants $934.53 for plans and specifications alleged to have been prepared by the plaintiff upon the instructions of the defendants. The learned Judge finds that the plaintiff was in fact employed by the defendant Best and two other persons not parties to the action, and was not employed by the defendants Mancil and Woods; that none of the three who employed the plaintiff was the agent of either Mancil or Woods; and that Mancil did not

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adopt or ratify the acts of Best and the other two persons. As against Mancil and Woods, action dismissed with costs. Judgment for the plaintiff against Best for $500 and costs. F. Morison, for the plaintiff. W. Bell, for the defendants.

CHRISTIE, BROWN & CO., Limited v. WOODHOUSE.

Ontario High Court, Cartwright, M.C. October 5, 1912.

DISMISSAL AND DISCONTINUANCE (§ I—1)—*Con. Rule 430—Proceedings Taken after Delivery of Statement of Defence—Order to Produce and Appointment for Examination of Defendant.*]—Motion by the defendant to dismiss the action, which was brought to recover possession of land. The principal defence was the Statute of Limitations. The action was begun on the 21st February, 1912; a statement of defence was delivered on the 18th May. Two days later, the plaintiffs took out the usual order for production by the defendant and an appointment to examine the defendant for discovery on the 29th May. The examination was not proceeded with. Issue was joined before the 1st July, 1912. On the 13th September, the plaintiffs served a notice of discontinuance. On the 1st October, the defendant gave notice of this motion—to dismiss the action "or for such other order as may seem just." Upon the motion coming on for hearing, it was objected by the plaintiffs that the motion should have been to set aside the discontinuance. The Master said that the objection was probably well taken; but the notice of motion could be amended, as the simple point for decision was, whether the plaintiffs were within clause (1) of Con. Rule 430, or must proceed under clause (4). Clause (1) provides that "the plaintiff may, at any time before receipt of the statement of defence . . . or after receipt thereof before taking any other proceeding in the action (save an interlocutory application) . . . wholly discontinue his action." Clause (4) provides that, save as before provided, it shall not be competent for the plaintiff to discontinue without leave. The Master was of opinion that what was done by the plaintiffs to obtain discovery after the delivery of the statement of defence was "taking any other proceeding." Reference to Schlund v. Foster, 10 O.W.R. 1005; Spincer v. Watts, 23 Q.B.D. 352, 353; Vickers v. Coventry, [1908] W.N. 12. The plaintiffs should have leave to discontinue in the terms approved of in Schlund v. Foster, 11 O.W.R. 60, 175, 314; and, if the plaintiffs should take that order, the costs of the motion would be costs in the cause. If the plaintiffs desired to proceed, the notice of discontinuance would be set aside with costs to the defendant in any event. E. Meek, K.C., for the defendant. W. B. Milliken, for the plaintiffs.

YOUNG v. PLOTYMEKI.

Ontario High Court, Riddell, J. October 5, 1912.

VENDOR AND PURCHASER (§ I E—25)—*Sale of Land—Default—Rescission—Forfeiture of Sums Paid—Judgment—Costs.*]—Motion by the plaintiffs for judgment on the statement of claim in default of defence in an action for a declaration that the plaintiffs (vendors) were entitled to determine an agreement for the sale of two lots of land in Fort William and to retain any sum or sums paid under the agreement, for rescission of the agreement, and for possession. RIDDELL, J., after consideration, directed that the usual judgment for rescission and forfeit of deposit and sums paid on account and for costs should be issued. J. D. Bissett, for the plaintiffs. No one appeared for the defendant.

POLLINGTON v. CHEESEMAN.

Ontario High Court, Cartwright, M.C. October 3, 1912.

PARTIES (§ III—124)—*Motion to Set aside Third Party Notice—Time for Moving—Employers' Liability Insurance—Terms of Policy—Action for Damages for Death of Employee.*]—Motion by the Travellers Insurance Company, third parties, to set aside the third party notice served upon them by the defendant. The defendant objected that the motion was too late, the company having appeared; but the Master said that Holden v. Grand Trunk R.W. Co., 2 O.L.R. 423, was no longer an authority on this point: see Donn v. Toronto Ferry Co., 6 O. W.R. 973; and the motion must be dealt with on its merits.—The action was for damages for the death of the plaintiff's son while in the service of the defendant. The third parties had insured the defendant against liability for accidents to employees; and, in accordance with the provisions of the policy, the defence was at first undertaken by the company and an appearance entered by their solicitors, without prejudice to the right of the company to decline to go on with the defence on further investigation. Later, the company declined to accept the risk of the accident to the plaintiff's son and relinquished the defence. The defendant then defended by his own solicitor, and served the third party notice upon the company.—The company contended that the issuing of the third party notice was in violation of clause E. in the policy, providing that no action should lie against the company to recover any loss, unless for loss actually sustained and paid in money in satisfaction of a judgment, etc. The Master said that, if this condition was to be construed literally, it would prevent the issue of a third party notice if such notice was to be considered equivalent to

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bringing an action against the company. This surely could not be a tenable position, as it would enable an insurer at his will to prevent the application of the third party procedure—at least it could not be so decided on an interlocutory application. —The second ground of objection was that the defendant had admitted to an officer of the company that the deceased, at the time the injuries complained of were sustained, was not engaged in the business operations of the defendant as described in the policy. This was stated on affidavit, but the opposite was averred in the affidavit of the defendant. The Master said that effect could not be given to this objection at the present stage, though both objections might avail the company to escape liability if the plaintiff succeeded against the defendant. In the meantime, it would seem to be the company's proper course to be present at the trial and support the defence as against the plaintiff; if that defence should fail, it would still be open to the company to shew that the defendant had no recourse against the company under the terms of the policy. Reference to Pettigrew v. Grand Trunk R.W. Co., 22 O.L.R. 23; Swale v. Canadian Pacific R.W. Co., 25 O.L.R. 492; Walker and Webb v. Macdonald, 4 O.W.N. 64. Motion dismissed with costs to the defendant in the third party issue in any event. T. N. Phelan, for the company. Frank McCarthy, for the defendant.

WALKER v. MAXWELL.

Ontario High Court. Trial before Lennox, J. October 5, 1912.

VENDOR AND PURCHASER (§ I E—27)—*Sale of Land—Condition—Representations—Failure to Prove Truth of—Rescission—Evidence—Exclusion.*]—Action for the rescission of a conditional contract entered into by the plaintiff for the purchase from the defendants of 320 acres of land in Saskatchewan, for the delivery up of a promissory note made by the plaintiff, for the repayment of money paid in connection with the contract and interest, and for damages. There were four defendants—White, Robertson, Maxwell, and Smith.—The trial was begun before LENNOX, J., without a jury, at Owen Sound, on the 18th June last. At this time, counsel for the different defendants agreed that they did not wish any distinction made between the defendants, but would be content with a judgment for or against all. The case was then adjourned for argument at Toronto, and was taken up on the 19th September. Counsel for the defendants Maxwell and Smith then asked leave to call evidence to shew the relations existing between these two defendants and the other two defendants, with the view of ultimately arguing that, even if White and Robertson were liable, Maxwell and Smith

were not. All the other parties objected to this; and the learned Judge, having regard to the previous conduct of the case, and the very great inconvenience and injustice involved in the admission of this evidence, refused to admit it.—To induce the plaintiff to sign the formal contracts of sale and purchase, the defendant Robertson, representing all the defendants, drew up, signed, and delivered to the plaintiff the following document: "Owen Sound, April 19th, 1911. This writing is to certify that James D. Walker, of Owen Sound, agrees to sign and settle land bought in the vicinity of Battleford" (describing it) "upon the condition that the land upon inspection is as represented, good farm land, clay loam, slightly rolling, and located close to G.T.P. Ry., otherwise contracts to be *refunded* together with cash paid." Thereupon the plaintiff signed the formal contracts, paid the sum of $320 by cheque, and gave his promissory note for $952. The learned Judge construes this to be not an absolute but a conditional contract, conditional and partly executed, and to take effect only if, upon inspection, the land turned out to be as represented. The plaintiff made his inspection promptly, and at once refused to take the property. The learned Judge finds as a fact that none of the representations contained in the writing quoted were true. Judgment for the plaintiff for the relief claimed (except damages) with costs. W. H. Wright and J. A. Horning, for the plaintiff. I. B. Lucas, K.C., for the defendant White. McEwan, for the defendant Robertson. A. G. MacKay, K.C., and H. G. Tucker, for the defendants Maxwell and Smith.

FARMERS BANK OF CANADA v. SECURITY LIFE ASSURANCE CO.

Ontario High Court, Cartwright, M.C. September 23, 1912.

WRIT AND PROCESS (§ II A—16)—*Service out of the Jurisdiction—Motion to Set aside—Guaranty Executed in another Province—Conditional Appearance.*]—This was an action on a guaranty given by the defendants, who were all residents at Montreal, where the document was executed on the 29th December, 1909. The usual order for service abroad was made under Con. Rule 162 (e); and the defendants moved to set this aside. The guaranty was admittedly signed at Montreal, and it was argued that prima facie this would not import payment outside the Province of Quebec. It was further contended that, in any case, even if the guarantors had to seek out their creditor, this would be done in Montreal itself, because sec. 70 of the Bank Act, R.S.C. 1906 ch. 29, provides that "the bank shall establish agencies for the redemption and payment of its notes at the cities of Toronto, Montreal," and others; and that, therefore,

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payment of the obligation in question could be properly made at Montreal, unless there was an express agreement to the contrary. It was contended, in addition, that a bank, being incorporated to do business throughout the Dominion, could not be said to be resident in the Province in which its head office was situated more than in any other; and the provisions of sec. 76(a) of the Bank Act were also emphasised. The Master said that the questions were new in his experience, and were worthy of consideration. Copies of the whole correspondence had been put in by the plaintiffs, comprising letters passing between the defendants and the head office of the plaintiffs, or their Toronto solicitors, and pressing for payment. If this was to be made at the head office or to the solicitors, then the order was right. But this was nowhere exactly stated, though the whole of the negotiations were with them only. The matter was left in such doubt, that the best course seemed to be to allow the defendants to enter a conditional appearance, and leave the plaintiffs to prove a cause of action within the Province, on peril of having their action dismissed with costs. This was approved in the recent case of Farmers Bank of Canada v. Heath, 3 O.W.N. 682, 805, 879; and a similar order should be made in this case; the defendants to have a week to appear; costs in the cause. H. E. Rose, K.C., for the defendants. M. L. Gordon, for the plaintiffs.

BLACK v. CANADIAN COPPER CO.

Ontario High Court, Cartwright, M.C. September 25, 1912.

PLEADINGS (§ I C—21)—*Statement of Claim — Motion for Particulars — Nuisance — Damages.*]—This action was brought by a florist residing at Sudbury to restrain the defendants "from continuing to allow the escape of noxious vapours, gases, acids, smokes, etc., from their roastbeds and smelter on to the lands of the plaintiff and the vegetation thereon." The plaintiff also claimed $5,000 for damages already suffered. In the 4th paragraph of the statement of claim it was said that the defendants "wrongfully and negligently permitted and allowed the said noxious vapours, gases, acids, and smoke to escape," and thereby caused the plaintiff great damage in respect of his plants, flowers, trees, etc. In the 5th paragraph it was said that the plaintiff, in consequence of the continued damage, had been obliged, at great sacrifice, to sell his property, and must move some miles from Sudbury if he was successfully to carry on his business, in case the defendants were permitted to continue their present methods of smelting. The defendants, before pleading, demanded particulars, under the 4th paragraph, of the negligence therein charged, as well as

of the plants, etc., said to have been destroyed or injured. As to paragraph 5, particulars were asked as to what was meant by the sale of the lands at a great sacrifice. The plaintiff's solicitors in reply sent a telegram saying, "Defendants have all particulars referred to." The defendants thereupon moved to set aside the statement of claim, as not complying with Con. Rule 268, and in particular paragraphs 4 and 5, as being embarrassing because indefinite, or for particulars. The Master referred to Tipping v. St. Helen's Smelting Co., 4 B. & S. 608, 616, 11 H.L.C. 642; Smith v. Reid, 17 O.L.R. 265; and said that the one material fact on which the plaintiff must rely was that damage had been caused to his property by the defendants' works. This was sufficiently and plainly alleged in the 4th paragraph, and no particulars were necessary at this stage. As to the 5th paragraph, if the defendants were held liable, the damages payable to the plaintiff would most probably be a matter of reference and would not be gone into at the trial, which would, no doubt, be before a Judge without a jury. The Master also drew attention to the absence of any affidavit by the defendants that the particulars asked for were necessary for pleading, and said that this omission was suggestive, in face of the telegram of the plaintiff's solicitors. Following his previous decision in Spalding v. Canadian Pacific R.W. Co., 9 O.W.R. 870, he thought that the motion should be dismissed (costs in the cause) and the statement of defence should be delivered in ten days: this without prejudice to a similar motion after discovery, if the defendants should think it necessary. H. E. Rose, K.C., for the defendants. C. M. Garvey, for the plaintiff.

WILLIAM PEACE CO. v. WILLIAM PEACE.

Ontario High Court. Trial before Latchford, J. September 25, 1912.

CONTRACTS (§ III E—288)—*Limitation—Restraint of Trade—Injunction—Patent for Invention—Infringement.*]—Action for an injunction and damages in respect of an alleged infringement of a patent and for breach of a covenant. The defendant undertook, for good consideration, not to engage in any business for the manufacture of weather-strips within the city of Hamilton or within five miles of the city limits for a period of ten years; and further covenanted that he would not allow his name to be used in connection with any such business. The learned Judge finds that the defendant has been guilty of a breach of both the provisions of this covenant; and awards the plaintiffs a declaration and injunction accordingly with costs. Upon the question whether the metallic strip used by the defendant, after the plaintiffs had threatened to take action against him, was an infringe-

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ment of either of the patents assigned to the plaintiffs by the defendant, the learned Judge finds in favour of the defendant. T. Hobson, K.C., for the plaintiffs. A. O'Heir, for the defendant.

RICKART v. BRITTON MANUFACTURING CO.

(Decision No. 2.)

Ontario High Court, Cartwright, M.C. October 8, 1912.

PLEADING (§ I S—149)—*Striking out Defence—Con. Rule 298—Non-payment of Interlocutory Costs—Remedy.*]—The facts of this case are to be found in the note of a previous motion, 4 D.L.R. 366, 3 O.W.N. 1272. The statement of defence was delivered on the 10th September. The plaintiffs moved to strike out parts of paragraphs 3 and 5 and all of paragraphs 6, 7, 8, 9, and 13, on the usual grounds, under Con. Rule 298. The Master said that paragraph 13 was not objectionable at this stage, as it merely denied the plaintiffs' right to the assistance of the Court. —Paragraphs 6, 7, 8, and 9 set out the fact (which was not denied) that certain interlocutory costs awarded to the defendants, amounting in all to over $230, had not been paid, and alleged that, by this default, the plaintiffs had abused the process of the Court, and were thereby disentitled to any relief which might otherwise have been given to them. On this point, the Master referred to Stewart v. Sullivan, 11 P.R. 529, and Wright v. Wright, 12 P.R. 42; and said that the remedy in such cases is by application to the Court for a stay until payment has been made. The fact of non-payment, though admitted, is no defence to the action; and paragraphs 6, 7, 8, and 9 should be struck out, leaving the defendants to move, if so advised, for a stay of proceedings.—The part of paragraph 5 objected to alleged that the plaintiffs, by their use of the word "registered" in their alleged trade mark, were "guilty of the indictable offence" defined in secs. 335 and 488 of the Criminal Code, and were thereby debarred from any relief in respect thereof. On this question the Master referred to and followed the similar case of Ontario and Minnesota Power Co. v. Rat Portage Lumber Co., 3 D.L.R. 331, 3 O.W.N. 1078, 1182; saying that the part of paragraph 3 objected to was useful only as leading up to paragraphs 6, 7, 8, and 9; and, these being struck out, it followed that paragraph 3 should be curtailed as asked for in the motion. Costs of the motion to be in the cause, as success was divided. J. G. O'Donoghue, for the plaintiffs. C. G. Jarvis, for the defendants.

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press grant of the easement has been made." Consequently, the Crown, by what was done, gave the grantee the right to carry on saw-milling "in the ordinary way"—and that, it is admitted, was, at that time, throwing saw-dust, etc., into the stream. The natural result being that this was carried down stream over and between other lands of the Crown, the grantee acquired the easement over such lands necessary to enable him to carry on in the ordinary way his business. That this "polluted" the water is immaterial—"a right to pollute water may be acquired by grant, express or implied:" Goddard, 7th ed., p. 355—and not less than others on the doctrine that a vendor cannot derogate from his own grant.

In *Hall* v. *Lund* (1863), 1 H. & C. 676, S., the owner of certain land, demised part of it, a mill, to the defendant, described as a "bleacher." This had been used as bleaching works, and it was mentioned (in effect) in the lease that it was for the purpose of carrying on the business of bleaching. The defendant entered and carried on his business as a bleacher, which involved throwing into a stream passing through S.'s other land a considerable amount of foul and polluting matter, pulp, refuse, drugs, etc. The plaintiff bought the other land of S. and the reversion of the mill. Pollock, C.B., "cannot see any difference" between "the lessee using the stream for the purpose of carrying off his refuse" and "taking water from a stream and returning it in a foul condition," and adds: "The plaintiff, who purchased the reversion, stands in the same position as the lessor, and cannot derogate from his own grant:" p. 683. Channell and Wilde, BB., also considered that the lessor, having demised the premises for the purposes of bleaching, neither he nor those claiming under him could derogate from their own grant. See Gale, 8th ed., p. 124.

Ewart v. *Cochrane* (1861), 4 Macq. H.L. 117, is another case of right to foul a stream being acquired by implied grant—implied because this was necessary for the convenient and comfortable enjoyment of the property granted, not essentially necessary so that the property granted would be valueless without it (p. 123). Lord Chelmsford says (p. 125): "It was essential to the enjoyment of the tan-yard, and therefore one must imply a grant to D. when the tan-yard was conveyed to him . . ."

There are other cases, not of pollution, decided on the same principle, *e.g.*, *Siddons* v. *Short*, 2 C.P.D. 572. The plaintiffs desired to build an iron foundry, and bought land from the defendants for that purpose—nothing being said in the deed as to the purpose. The defendants were prevented from mining for coal upon the rest of their land so near as to imperil the plaintiff's building, although the deed contained no grant of right to support, and the natural right to support for the land unburdened would not have entitled them to support for their new buildings.

I think the Crown was bound not to prevent the purchaser acting in the ordinary course of saw-milling at that time, and

could not object to his doing so in virtue of ownership of lands lower down.

The saw-mill began operations in 1855, as stated at the trial, not disputed, and in effect found by the trial Judge—the witness Bower and others prove it satisfactorily—Ferguson, the grantee, and Cameron, his partner, operating it.

At some time—when, does not appear—the plaintiff acquired title to lot 10; his father, apparently, before him, owned the land; the furthest back I can find any reference to this ownership being at p. 23, where the plaintiff says that his father had been running a saw-mill at the point for eighteen or twenty years, and stopped, as he supposes, twenty years ago. This is just a guess apparently (p. 24); but, if we accept it, and if (which does not appear) the father began sawing as soon as he got a patent (if he did get one) of the land, the date is carried back to 1872 or 1870. In any event, the predecessor in title of the land of the plaintiff obtained his patent subsequent to that of the predecessor in title of the land of the defendants. If such be not the fact, it was for the plaintiff to make it clear; and he should be allowed to put in the patent of lot 10. The plaintiff's predecessor took no more by his grant than the Crown had to give him; and, consequently, the plaintiff holds the land subject to the easement already mentioned, unless something more appears in the case.

The Registry Act does not assist the plaintiff. From the first Registry Act in Upper Canada, in 1795, 35 Geo. III. ch. 5, the operation of the statute is limited to a period after the grant from the Crown. It will, however, be proper to consider what took place after 1855. The evidence does not warrant any finding other than that until 1895 or 1896 the defendants' predecessors in title used the stream as a vehicle for carrying off the saw-dust, etc., from the upper mill, and that no substantial change took place.

I think we are bound by the decision of the Divisional Court in *Re Cockburn*, 27 O.R. 450, to hold "that where twenty years' open and uninterrupted user is proved, a jury may and ought to presume the existence of a lost grant, if . . . there be no evidence in denial, explanation, or modification of the actual enjoyment, and that this presumption cannot be displaced by merely shewing that no grant was in fact made, though it is rebutted if there be an incapacity to grant the easement, extending over the whole period in the course of which the right (if granted at all) must have been granted:" p. 467. I do not discuss the many cases before *Re Cockburn* and *Dalton* v. *Angus*, 6 App. Cas. 740, upon which it is founded.

That the doctrine of lost grant has not been affected or become effete by the operation of the statute, is clear. More than twenty years' quiet and uninterrupted user of the easement took place during the time of the plaintiff and his father, before 1895 or 1896.

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The statutes of Canada against throwing saw-dust, etc., into navigable waters are appealed to. The first of these is (1873) 36 Vict. ch. 65, sec. 1, assented to on the 23rd May, 1873, which forbids owners, etc., of saw-mills throwing saw-dust, etc., "into any navigable stream or river either above or below the point at which such stream or river ceases to be navigable." Even supposing that this statute should be held to apply to the Constant creek, and that it would void a grant after the statute, there was a time during which the predecessor in title of the plaintiff could have legally granted the easement claimed; and that, according to the authorities quoted, is sufficient to compel us to infer a lost grant at that time. The enactment of the statute would or might not affect the rights of the owners *inter se*.

In 1886, by 49 Vict. ch. 36, sec. 8, this Act was repealed, and sec. 7 introduces a provision somewhat different: "No owner . . . of any saw-mill . . . shall throw . . . any saw-dust, edgings . . . into any river, stream or other water any part of which is navigable, or which flows into any navigable water . . ." This became R.S.C. 1886, ch. 91, sec. 7, and is now R.S.C. 1906, ch. 115, sec. 19.

There is no evidence that Constant creek itself is navigable—so that the original Act of 1873 would not apply; nor is the evidence such as that it could be found that the later statutes have any application. The branch of the Constant upon which these mills are situated is above Ferguson Lake—it flows into that lake, which is about a mile long—but there is no evidence that this lake is navigable. Then a stream flows from Ferguson Lake down to McNulty Lake or "eddy, you couldn't call it a lake," and then to Calabogie Lake, which is navigable. It is not apparently the case of a large stream or river having an expansion in its course, like the River St. Lawrence and Lake St. Louis, but rather like a chain of lakes—at least so far as Ferguson and Calabogie are concerned—with streams connecting the upper with the lower. It seems to me that the stream, twenty miles away, can no more be said to flow into Calabogie Lake than the St. Clair can be said to flow into Lake Erie. Criminal statutes are to be interpreted strictly; and I am unable to convince myself that the acts of the defendants, continued for so many years, are criminal in the sense of violating the statutes of Canada.

The Ontario legislation, now R.S.O. 1897, ch. 142, sec. 4, from the beginning excepted saw-dust: see C.S.U.C. ch. 47, sec. 2. And, moreover, in the body of the section itself, sec. 4, it is made applicable, not to all streams, but to all except those thereafter mentioned—those are set out in sec. 6, and, amongst others, include "rivulets wherein salmon, pickerel, black bass or perch, do not abound." The exception is contained in the section creating the offence and imposing the penalty—and in such cases the person alleging an offence against the statute must, at least in

civil proceedings, prove that the case is one to which the general words apply. See the cases cited by Lord Alverstone, C.J., in *Rex* v. *James*, [1902] 1 K.B. 540, at pp. 544, 545. At the worst, in view of the long and uninterrupted course of action by the defendants and their predecessors in title, one should not hold that the prohibition did exist, without clear evidence of the application of the statute.

So far then as saw-dust is concerned, there is nothing to prevent the implication that the Crown gave the power to foul the stream; and, as I think, the same should be held in respect of the other materials from the mill thrown into the stream. If, indeed, it were contended, as I think it is not, that the stream is not one within sec. 6, the plaintiff should, if it be material, have the privilege of proving it if he can.

If this view be correct, none of the acts relied upon by the plaintiff of payment by the defendants have any bearing—a right acquired is not divested without something equivalent to a grant—the mere payment of money may be and often is cogent evidence of what the person paying conceives his rights to be, but it does not determine what the rights are, or by itself derogate from rights actually existing. And the same remarks apply, as I think, to a lost grant.

But I agree that, if the acts complained of were illegal, there could be no implication that the grant of land for the purpose of a saw-mill also gave the right to violate the statute. And the law would not imply that the lost grant to be found contained a grant of the right, even as against the grantor, to do an act forbidden by the law: *Rochdale Canal Co.* v. *Radcliffe*, 18 Q.B. 287; *Neaverson* v. *Peterborough Rural District Council*, [1902] 1 Ch. 557, reversing *S.C.*, [1901] 1 Ch. 22.

I do not discuss the statute or the effect of the more or less ambiguous payments upon any right to be acquired under the statute. It would appear that the learned trial Judge thought that the yearly payments were for a use of the waters in excess of the right acquired by the defendants under the statute—but that I do not go further into. It seems that no greater amount of sawdust, etc., has, since the burner was erected in 1903, been placed in the stream than before the first payment. I cannot see that the plaintiff has made out a case. If the right came by implication from the Crown, with the patent, it does not appear that any excess has been committed—and if by implication through a lost grant, the same statement applies.

If the plaintiff desires to be permitted to shew that the stream is not within sec. 6 of the Ontario Act, he should be allowed to do so, in which case the costs of action, appeal, and new evidence should be reserved to be disposed of upon the renewed application to this Court—but, if not, the appeal should, in my view, be allowed with costs, and the action dismissed with costs.

Appeal dismissed; RIDDELL, J., *dissenting.*

B.C.

C. A.

1912

Feb. 16.

Re TIDERINGTON.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Galliher, JJ.A. February 16, 1912.

1. APPEAL (§ I B—20)—RIGHT OF APPEAL—DISCHARGE ON HABEAS CORPUS UNDER EXTRADITION COMMITMENT.

In the absence of Federal legislation permitting it, an appeal does not lie from an order discharging on *habeas corpus* a person from custody under a commitment for extradition.

[*Cox* v. *Hakes*, 15 App. Cas. 506, and *Rex* v. *Carroll*, 14 Can. Crim. Cas. 338, 14 B.C.R. 116, followed; *Barnardo* v. *Ford*, [1892] A.C. 326, and *Re Hall*, 8 A.R. (Ont.) 135, distinguished.]

Statement

APPEAL by the State of Washington from an order of Hunter, C.J., upon *habeas corpus*, discharging Archibald Tiderington from custody under a commitment for extradition.

The appeal was dismissed.

E. V. Bodwell, K.C., for the appellant.

R. C. Lowe, for the prisoner.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—Archibald Tiderington was committed by His Honour Judge Lampman, sitting as an Extradition Commissioner, for extradition to the State of Washington on a charge of embezzlement. An application was made to Gregory, J., for a writ of *habeas corpus* to discharge the prisoner from custody. This was refused, and a second application was made to Hunter, C.J., and granted, and the prisoner was accordingly discharged. This is an appeal from the said order, by the prosecution. The grounds of appeal relied upon are, that the application for a writ having been refused by Gregory, J., no order for discharge could be made by any other Judge of the same Court, and that on the merits the order complained of should not have been made.

The jurisdiction of this Court to entertain an appeal was raised, and after argument we took time to consider. I have come to the conclusion that the preliminary objection must be sustained. Up to the time of the passing of the Judicature Acts in England, it is quite clear that there was no appeal from an order made in *habeas corpus* proceedings remanding or discharging the person detained.

The applicant for a writ of *habeas corpus* could apply to a Judge of any Court, and, if refused, to the Court itself, and if there refused, then to a Judge of another Court, or to that Court itself, and so on successively. But such applications were not regarded as appeals but as original applications. After the Judicature Act (1873) the question arose as to whether or not the section giving jurisdiction to the Court of Appeal, and which provided that an appeal might be taken from all judgments, orders, and decrees of the High Court to the Court of Appeal,

was wide enough to include an appeal in *habeas corpus* proceedings.

The question came before the House of Lords in *Cox* v. *Hakes*, 15 App. Cas. 506. In that case the application for the writ was granted by the lower Court, and the person detained was discharged from custody. The majority of their Lordships held that in such a case no appeal was intended by Parliament. As I read the case, their Lordships, while conceding that the general words of sec. 19 of the Judicature Act were wide enough to give an appeal, yet thought Parliament did not intend to prejudice the liberty of the subject by giving an appeal against his discharge from custody; that, if it had been intended to do this, Parliament would have used express words; and in arriving at this conclusion they were much influenced by the consideration that no machinery was provided in the Judicature Act for effectually dealing with the case where the person who had been detained could not be brought before the Court, and could not be remanded to custody by the appellate Court.

Mr. Bodwell pointed out that in the case of *Barnardo* v. *Ford*, [1892] A.C. 326, the House of Lords appear to have come to a contrary conclusion, but that was a different case. In that case their Lordships decided the question which they refrained from deciding in the earlier case of *Cox* v. *Hakes*, *supra*.

In the *Barnardo* case, *Barnardo* v. *Ford*, [1892] A.C. 326, they decided that where the writ of *habeas corpus* was refused, an appeal would lie. That would be in favour of the liberty of the subject, and in such a case the Court of Appeal could effectuate its judgment, the detained person being still in custody.

Mr. Bodwell also referred us to *In re Hall*, 8 A.R. (Ont.) 135, which was an extradition case in the province of Ontario, in which the Court of Appeal entertained an appeal from an order remanding the accused person to custody.

That case is based entirely upon a local statute passed before Confederation, and at the date of that decision still in force, which expressly gave a right of appeal in *habeas corpus* cases. It is, therefore, clear to my mind that, when the civil and criminal law of England were introduced into this province on the 19th November, 1858, there was, under the laws of England, no right of appeal in a case like the present; and, if there is now any such right, it must rest upon some statutory enactment.

We have been referred to no Act of the legislature prior to the incorporation of British Columbia in the Dominion of Canada providing for any such right of appeal. Since Confederation the practice and procedure in criminal matters rests entirely with the Parliament of Canada, and no right of appeal is given in *habeas corpus* cases by any Dominion statute or code.

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That the present is a criminal cause or matter, I think, cannot be doubted, especially in view of the decision in *Ex p. Woodhall*, 20 Q.B.D. 832. That was a case where the Queen's Bench Division refused an application for a writ of *habeas corpus* on behalf of the person committed to prison under the Extradition Act. As the English Judicature Act, sec. 47, contained a provision that there should be no appeal to the Court of Appeal in any criminal cause or matter, the question arose as to whether a case like the present was a criminal cause or matter, and the Court there unanimously held it was. I do not find that that decision has ever been disapproved of. Now, while there is no provision in our Court of Appeal Act that there should be no appeal in any criminal cause or matter, it is not necessary, in my opinion, that there should be such in order to exclude such an appeal, because the province has no jurisdiction in such a matter at all.

Any Act of the province giving the right of appeal in a criminal matter, in the sense in which jurisdiction is given to the Dominion in such matters, would be *ultra vires* of the province. Had this been a case other than a criminal cause or matter, such, for instance, as detention for a breach of a provincial statute, or detention of a person without any authority at all, such as was the *Barnardo* case, *Barnardo* v. *Ford*, [1892] A.C. 326, an appeal would probably lie to this Court. It is unnecessary to decide that question now, but the *Barnardo* case would seem to indicate that that would be so.

I think, therefore, the appeal must be quashed, as we have no jurisdiction to hear it.

Irving, J.A.

IRVING, J.A.:—In *Ikezoya* v. *Canadian Pacific R. Co.*, 12 B.C.R. 454, the right to appeal was questioned on two grounds: (1) that, the man having been released, an appeal would be futile, based on *Cox* v. *Hakes*, 15 App. Cas. 506; (2) that the Courts had no jurisdiction in the premises, as the matter was a departmental matter. The point raised in this case was not discussed at either of the two arguments.

By sec. 19 of the Extradition Act, the prisoner is advised as to his right to apply for a writ of *habeas corpus*, but the Act makes no provision for its issue; that is unnecessary, because the right to the writ is a right which exists at common law independently of statute. The jurisdiction to issue the writ was part of the inheritance of the Supreme Court of British Columbia from the early Colonial Courts, and any person who is in custody under a warrant or order of commitment has a right to have the validity of that warrant or order tested by means of a writ issued out of the Supreme Court, irrespective of the legislative authority governing the issue of the writ. Then,

that Court having given its decision, does an appeal lie to this Court?

Mr. Lowe argues that the right of appeal being statutory, and the Dominion Parliament not having dealt with the matter, no appeal lies, relying on the reasons adopted by the full Court in *Rex* v. *Carroll*, 14 Can. Crim. Cas. 338, 14 B.C.R. 116, where it was held that there could be no appeal to the full Court from the decision of a single Judge in a criminal case, unless such appeal was given by federal legislation. This argument seems to be unanswerable, and I do not think we have any jurisdiction to hear this appeal. There is possibly another ground on which this conclusion could be reached, that is, that by sec. 132 of the British North America Act, all powers necessary or proper for performing treaty obligations are committed to the federal Parliament.

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Irving, J.A.

GALLIHER, J.A., agreed in dismissing the appeal.

Galliher, J.A.

Appeal dismissed.

HAVNER v. WEYL.

SASK.

Saskatchewan Supreme Court. Trial before Newlands, J. July 6, 1912.

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July 6.

1. PRINCIPAL AND AGENT (§ II A—8)—AGENT'S AUTHORITY TO SECURE PURCHASER FOR LAND—RIGHT TO CONCLUDE AGREEMENT FOR SALE—SPECIFIC PERFORMANCE.

One who enters into possession of land under an agreement for its purchase made by an agent of the owner, which was not satisfactory to the latter, cannot obtain specific performance of the agreement where the agent had authority only to secure a purchaser and not to enter into a contract for the sale of the property.

TRIAL of an action for specific performance of a contract to sell lands.

Statement

The action was dismissed.

J. A. Allan, for plaintiff.

Henry V. Bigelow, for defendant.

NEWLANDS, J.:—This is an action for the specific performance of an alleged agreement for the sale of land.

Newlands, J.

The plaintiff alleges that by a verbal agreement between the defendant, through his agent, one H. Westergaard, and himself, on or about the 27th April, 1911, the defendant agreed to sell him the south-east quarter of section 34, township 5, range 9, west of the 2nd meridian, for the sum of $1,600, payable as follows: by the assumption of a mortgage upon the said property for the sum of $500 and by the payment of the balance in cash. He further alleges that he paid to the defendant's agent, Westergaard, $1,283.78, the balance of the purchase-money over and above the sum of $516.22 due on the mortgage, entered into possession of the land, and made valuable improvements thereon.

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The defendant denies that Westergaard had authority to sell this land, and claims that he exceeded his authority in entering into the above agreement; and he pleads the Statute of Frauds.

Westergaard's authority to act as agent for the defendant is contained in a letter written by the defendant to him on the 13th of April, 1911, where he says:—

> The enclosed clipping is of the kind which appears daily in our papers, and it seems to me that the demand for land would be such that it would not be a difficult matter to find a buyer for my land near Macoun, the south-east quarter of section 34-5-9. I may not be acquainted with all the circumstances, but as I am not on the ground, it is hard to find a buyer at this distance. Of course I expect to pay for the trouble, and if possible can you take up this matter and dispose of the land to the best advantage? I won't set any price, but leave that to you, because during my visit to Macoun I noticed you wore the lodge pin of our lodge. Furthermore, I never asked a favour on the strength of the square and compass emblem until now, and feel the necessity of asking you to sell the land if possible.

Westergaard replied to this letter on the 15th of April, 1911, and amongst other things said:—

> I am not in the real estate business, although I have made a deal or two, so it would not be right for me to ask you to list the land with me, as it would only be by chance that I could dispose of it. If you care to give me your lowest price, I will inquire for a buyer, but cannot undertake to dispose of the land.

On the 21st April, 1911, the defendant wired Westergaard, "close deal, best price obtainable," to which Westergaard replied the same day:—

> Don't care to assume responsibility closing deal, reply too indefinite. Best offer $1,600. He also wrote the same day: When I wired you this forenoon I had what I thought was a prospective buyer, a man who was looking for a piece of land at a snap, and took him out to look over the place. . . . . I had expected a more definite reply to my wire, as I was not able to close any deal on what you said, and I don't see why you should leave a matter of some importance to you to me, a stranger, who might take advantage of your *carte blanche* power of attorney, so to speak. As mentioned before, I would not assume the responsibility. I pressed this party for an offer that I could submit to you, and the very best he would do was $1,600 cash, as it will require considerable cash to put the land in shape.

Up to this time Westergaard's only authority was to find a purchaser.

On the 24th of April, the defendant replied to this last letter:—

> As it is now, I will consider it a great personal favour to sell the land at the figures you mention, sixteen hundred, and I will make

out the papers as soon as I know the name of the buyer. . . . . I think it best to sell the land at once, and the figures or price above mentioned will be satisfactory. The Toronto General Trust Co. has mortgage of $500 on place. Originally there was eight hundred dollars of a mortgage, and of this I paid three hundred, so it leaves five hundred still unpaid. The interest is due December 1st, and is all paid. I appreciate the trouble you have gone to more than I can express. All I can add is, close the deal and I will appreciate the favour.

This gave Westergaard authority to close the deal to the man he mentioned and sell him the land for $1,600. This deal, however, did not go through, and on the night of the 26th of April Westergaard wired the defendant:—

Party referred to buying other land, will take it myself sixteen hundred, five hundred cash, six hundred November on my note bearing six per cent. interest, assume mortgage five hundred.

The defendant did not reply to this telegram because, he says, the price was below what he was asking, as he wanted $1,600 above the mortgage. On the 28th of April Westergaard wrote again to the defendant:—

Since sending you the telegram the other night, in which I stated I would personally purchase from you the south-east of 34-5-9W. 2nd. for $1,600, I have found a party who is willing to pay cash, and as I am not particularly anxious to take it myself, even on the terms stated, I enclose a transfer for the land, which please sign as indicated and return to me at your earliest convenience, so the deal can be settled and the money forwarded to you. Please also send me the tax receipts and the receipts shewing payment made on account of the mortgage to the Toronto General Trust Corporation, on which there remains unpaid $500.00, according to your letter. Please be very particular to see that the transfer is executed properly, and have the notary initial all changes, such as "province" to "state" as indicated in pencil. A deposit has been made by the purchasers to bind the deal, and I agreed to furnish the transfer without delay, as they have made arrangements to have the land summerfallowed, which will mean a cash outlay for them of about $400.00, and they naturally don't want to have the matter drag along. I have no doubt that you will prefer this deal to the other, as you will receive your full equity at once, instead of part cash and the balance in the fall.

A transfer was enclosed in this letter transferring the land to the plaintiff.

On May 5th Westergaard wired the defendant:—

Awaiting return signed transfer sent you last Friday, wire reply.

To this the defendant replied by letter on the 7th,

I received your message to return transfer, which accompanies this, also payment for your message, and if this isn't sufficient please let me know. At the time I received your first message I was under the impression that the sale would be sixteen hundred net, as I had written some time ago I thought the land ought to be worth $18 or

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$20 per acre. The place has cost me just $2,300, and to sell for $1,100 would be a big drop. I sincerely hope this has not put you to any inconvenience, and thanking you for the many favours, etc.

He returned the transfer in this letter unsigned. This is all the correspondence bearing upon the authority of Westergaard as agent. From it I am of the opinion that the defendant gave to Westergaard authority to find him a purchaser but not to close the deal until the letter of April 24th, when he gave him authority to close the deal he had on hand. This having fallen through, Westergaard would have no more authority than he had before, viz., to find a purchaser, not to close a deal for the sale of the property. He therefore had no authority to enter into a binding contract to sell the land to the plaintiffs, and the defendant never assented to the same. This sale is therefore not binding upon the defendant, and cannot be enforced as against him. There will be judgment for the defendant with costs.

Action dismissed.

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March 30.

NESBITT v. INVESTMENT TRUST CO.

Quebec Court of King's Bench (Appeal Side), Archambeault, C.J., Lavergne, Cross, Carroll, and Gervais, JJ. March 30, 1912.

1. APPEAL (§ XI—721)—LEAVE TO APPEAL—SUMMARY OR NON-SUMMARY PROCEEDING—C.P. QUE. ART. 46.

An appeal does not lie under article 46 C.P. from an order denying a motion to have a summary proceeding declared to be a non-summary one.

Statement

PETITION for leave to appeal. Petitioner has been sued for $52,097.39 and the action was issued as being one on summary matters, the words "Summary Procedure" appearing at the top of the writ and declaration. Petitioner contended that the question at issue does not fall under summary matters, and he moved in the Superior Court to have the proceedings declared non-summary. The motion was dismissed and petitioner asks leave to appeal from this judgment.

The petition for leave to appeal was dismissed.

E. Languedoc, for petitioner.
E. F. Surveyer, K.C., *contra*.

MONTREAL, March 30, 1912. The judgment of the Court was delivered by

Archambeault, C.J.

ARCHAMBEAULT, C.J.:—Art. 46 C.P. allows an appeal from an interlocutory judgment in three cases only: (1) When it decides in part the question at issue; (2) when it orders something

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to be done which cannot be remedied by the final judgment; (3) when it has for effect to unduly retard the trial of the case.

We are of opinion that the present case does not fall under any of these heads.

A.—The judgment appealed from does certainly not decide any of the questions in issue. It deals merely with a question of procedure.

Now summary matters are tried and heard in the same manner and by the same tribunal as ordinary actions, the only difference being that proceedings are more rapid in one case than in the other.

B.—Nor does the judgment attacked order the doing of anything which cannot be remedied by the final judgment.

Again I say this is merely a question of procedure. It was not the intention of the legislator to allow an appeal in such a case.

I do not wish to be understood as saying that the division of cases into summary and non-summary cases does not confer certain rights on the parties, nor as saying that the question is of no importance. The Code has established this division and I consider that the Courts are bound to follow its disposition on this point as on all others.

But the judgment of a Superior Court Judge on this point is final and without appeal.

C.—As to the third class of appealable interlocutory judgment. It is evident that the present one does not fall thereunder. Far from retarding the trial of the case it hastens it.

For these reasons we are of opinion that the petition for leave to appeal should be dismissed with costs.

Leave refused.

THOMPSON v. GRAND TRUNK R. CO.

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June 18.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. June 18, 1912.

1. RAILWAYS (§ II D 2—37)—LIABILITY OF RAILWAY COMPANY—DEATH OF TEAMSTER UNLOADING CARS—NON-REPAIR OF ROADWAY.

Where one is injured by the want of repair of a road in the station yard of a railway company, and the road is one which is used by the public openly and constantly as a road for teams, and there is no notice or other indication that it is not intended to be so used, the fact that the company has provided another road in good repair which might have been used, is no defence, in the absence of contributory negligence, to an action for damages for such injuries.

Statement

APPEAL by the defendants from the judgment of Teetzel, J., in favour of the plaintiff, upon the findings of a jury, in an action by Sarah Thompson to recover damages for the death of her husband, John Thompson, who was thrown from his

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waggon at Caledonia station and killed, owing, as alleged, to the negligence of the defendants in respect of the condition of the railway premises.

The appeal was dismissed.

D. L. McCarthy, K.C., for the defendants.

H. Arrell, for the plaintiff.

GARROW, J.A.:—The deceased was a teamster, and was employed to unload gas pipes from a car standing upon the defendants' track in their station-yard at Caledonia station. On the morning of the 17th May, 1911, he went with his team to begin the work, and while in the station-yard was thrown from his waggon and killed. The immediate cause of the jolt which threw him from the waggon was the sudden descent of one of the wheels into a rut in the roadway, which roadway, it is said by the plaintiff, was out of repair—such lack of repair being the negligence of which the plaintiff complains. The defendants deny that the roadway in question formed any part of the station-yard, and say that another and sufficient roadway along the other side of the track had been supplied and properly maintained, and was the only roadway which the deceased was entitled to use.

The roadway in question is upon the former site of a track which had for some reason been removed southerly a distance of about ten feet some two years before the accident—after which, as the undisputed evidence shews, teams began to be driven in and out over the ground formerly occupied by that track, a custom which continued without interruption by the defendants until the accident in question. There was some evidence that the condition of the road at the time of the accident had continued for some time prior thereto. The rut is described as two feet long and about eight inches deep.

The defendants called no witnesses. At the close of the plaintiff's case, a motion of nonsuit was made, upon the ground that no cause of action had been established, which was refused, and the case went to the jury, who, in answer to questions, found that the place on which the deceased was driving at the time of the accident was used by the public openly and constantly as a road for teams before the accident; that the defendants were guilty of negligence in allowing the rut or hole to remain as it existed at the time of the accident; that such negligence was the cause of the injury; that there was no contributory negligence; and they assessed the damages at the sum of $5,000, for which sum the plaintiff has judgment.

The case could not, I think, have been withdrawn from the jury. The material issues were upon questions of fact; and the findings are, I think, warranted by the evidence. The Dominion

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Railway Act, by sec. 284, imposes a duty upon railway companies to furnish adequate and suitable accommodation for the carriage, unloading, and delivery of traffic. And, although the road upon the south side was the better road, there was nothing to indicate that the other road upon the north side was not also to be used as part of the accommodation furnished. That it was being used, and used extensively and continuously, is abundantly clear from the evidence. And that it was out of repair and dangerous, to the knowledge of the station agent in charge, long before the accident, was not, on the evidence, an unreasonable inference, especially as the station agent was not called to deny it.

That it was necessary in order to reach the northerly roadway to drive over the rails which lay between the one road and the other, while of some significance, was certainly not, under the circumstances, conclusive.

The appeal, in my opinion, fails and should be dismissed with costs.

Meredith, J.A.

MEREDITH, J.A.:—There was evidence upon which the jury might find that the road, on the south side of the track, was apparently one intended to be used for the purpose of loading and unloading cars standing on the track lying between it and the road on the north side of it; also that the man who was killed was proceeding by way of the northerly road to the southerly one, there to unload the car, and was acting with ordinary care in so doing; and that the accident was caused by the negligence of the defendants in leaving a dangerous hole in the southerly road; and so a case for the jury was made; and the question of contributory negligence was also one for them on the facts of the case.

If the defendants did not intend the southerly road to be so used, they should have given notice to that effect or have stopped it up; for as it was it constituted an invitation, and one of an attractive character, saving the turning around of waggons on either side to unload there.

I would dismiss the appeal.

Moss, C.J.O., Maclaren, J.A., Magee, J.A.

MOSS, C.J.O., MACLAREN and MAGEE, JJ.A., concurred.

Appeal dismissed.

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June 4.

DICKINSON v. "THE WORLD."

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin and Galliher, JJ.A. June 4, 1912.

1. EVIDENCE (§ VIII—671b)—ADMISSIBILITY ON CROSS-EXAMINATION OF QUESTIONS AS TO WHAT WAS SAID AT A POLICE COURT HEARING.

In an action for libel complaining of the statement in a report of a Police Court trial that the plaintiff had been found guilty of blackmail, where the defence is an honest misunderstanding of what was said by the magistrate, and an apology, questions as to what was said about the plaintiff by the witnesses in the police Court are not admissible in cross-examination of the plaintiff.

[*Rex* v. *Prasiloski* (No. 2), 16 Can. Cr. Cas. 139, 15 B.C.R. 29, referred to.]

2. TRIAL (§ I D—23)—TRIAL OF LIBEL ACTION—REFERENCE BEFORE JURY OF PAYMENT INTO COURT—B.C. RULE 22, ORDER 22.

Rule 22, order 22, of the Supreme Court Rules of British Columbia applies to actions for libel, and, therefore, in such an action no reference can be made before the jury to the fact that money has been paid into Court.

[*Williams* v. *Goose*, [1897] 1 Q.B. 471, 66 L.J.Q.B. 345; *Klamborowski* v. *Cooke*, 14 T.L.R. 88, and *Veale* v. *Reid*, 117 L.T. Jo. 292, referred to.]

3. EVIDENCE (§ VIII—671b)—PROPER METHOD OF PROVING POLICE COURT PROCEEDINGS.

Where Police Court proceedings are relevant in an action the proper method of proving them is to put in the record of such proceedings.

[*Rex* v. *Prasiloski* (No. 2), 16 Can. Cr. Cas. 139, 15 B.C.R. 29, referred to.]

4. NEW TRIAL (§ I—2)—IMPROPER REFERENCE BY COUNSEL TO MONEY PAID INTO COURT.

Where counsel for the plaintiff improperly refers in his opening to the jury to the fact that money has been paid into Court, and counsel for the defendant objects, a new trial will be ordered, though counsel for the plaintiff apologizes for his statement and withdraws it, and counsel for the defendant does not ask to have the jury discharged.

Statement

AN appeal by the defendants from judgment at trial where a special jury awarded plaintiff $5,000 damages for libel.

This action is for libel contained in a report in the defendant's newspaper of a Police Court trial in which it was stated that the plaintiff had been "found guilty of blackmail." The plaintiff was charged in the Police Court with having obtained money by threats with intent to steal the same, and at the close of the case the magistrate announced that he would reserve judgment. Defendants plead that the reporter who was present at the trial and wrote the report had misunderstood what the magistrate said, and honestly believed that he had said he would reserve sentence, and that under this honest misapprehension the article was written in which the statement complained of was made. The magistrate subsequently dismissed the charge. The defendants upon discovering their mistake published an apology in their newspaper setting out the alleged mistake of the reporter. The plaintiff, in his statement of claim, limits his complaint to the libelous statement that he had been convicted. He makes no

complaint concerning the report of evidence given at the Police Court trial. Defendants pleaded mistake, and the apology and paid a sum of money into Court which they alleged was sufficient to satisfy the plaintiff's claim. A special jury awarded the plaintiff $5,000.

The judgment and verdict was set aside and a new trial ordered, Irving, J.A., dissenting.

Statement

D. G. Macdonell, for appellants.
W. B. A. Ritchie, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—Two grounds of appeal were strongly urged upon us on the argument. First, the refusal of the trial Judge to permit defendants' counsel to cross-examine the plaintiff to elicit what had been said about plaintiff by witnesses in the Police Court; and secondly, that the plaintiff's counsel mentioned to the jury the amount paid into Court.

The cross-examination in question was directed to what was said by witnesses against the plaintiff in the Police Court. Apart from the objection that the Police Court record must be produced as being the best evidence of what took place there, I am unable to see the relevancy of the rejected evidence, having regard to the frame of the pleadings. If it were intended to shew the jury that the plaintiff had according to the evidence of witnesses in the Police Court been guilty of the offence with which he had been charged, and hence had no character to lose, the evidence is clearly not admissible. It was open to defendants' counsel to cross-examine plaintiff as to credit, but that was not what was attempted in this case. The questions over-ruled were not as to his own conduct and character, but as to what witnesses in the Police Court had said about him. The proper mode of proving the Police Court proceedings, where admissible, was defined by this Court in *Rex* v. *Prasiloski* (No. 2) (1910), 16 Can. Cr. Cas. 139, 15 B.C.R. 29.

Then as to the other ground: It appears that the plaintiff's counsel when addressing the jury referred to the said payment into Court. Rule 22, order 22, of the Supreme Court Rules of British Columbia, reads as follows:—

> Where a cause or matter is tried by a Judge with a jury, no communication to the jury shall be made until after the verdict is given, either of the fact that money has been paid into Court, or of the amount paid in. The jury shall be required to find the amount of the debt or damages, as the case may be, without reference to any payment into Court.

Upon objection being taken at the time, Mr. Ritchie again addressing the jury, said:—

> I would like to say to you gentlemen, in regard to what I said as to the amount being paid into Court, I find I am mistaken about that. In mentioning that I find that I made a mistake. My learned

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> friend suggests it is like making the mistake of taking away a man's character; I do not think it is from the way they are treating the case, they seem to imply that some very trifling amount is all that is necessary. I do not know if I said there was anything paid into Court or not, but I find I was mistaken about their being willing to pay $5. I don't know anything about any money paid into Court, or if any money has been paid into Court. I want you to disregard what I said about this newspaper having offered to pay $5. Mr. Macdonell will tell you how much they are willing to pay; I will tell you how much we claim, and Mr. Macdonell will tell you how much they are willing to pay. I was mistaken in saying they were only willing to pay $5, as I do not know how much they are willing to pay.

And again, after recess, Mr. Ritchie, clearly referring to the same matter, said:—

> In regard to that matter this morning, my Lord, I notice according to English decisions that rule does not apply to libel suits.
>
> THE COURT:—I have been looking it up.

I think the rule does apply to libel suits. In an unreported case referred to in Ann. Prac. (1912), p. 38, Lord Russell refused to apply this rule to a libel case, and in another case he characterised the rule as foolish and inconvenient, and refused to be bound by it; but in *Veale* v. *Reid*, 117 L.T. Jo. 292, an action of libel, Ridley, J., said:—

> The fact that money had been paid into Court must not be mentioned to the jury.

Our rule is a statutory one, and I do not think we can take the liberty of refusing to be bound by it. The money could have been paid in either under the Libel and Slander Act, ch. 139, sec. 7, or under rule 1 of order 22, aforesaid. Rule 1 applies to two sets of circumstances (1) where the defendant pays under admitted liability. There there is no restriction of the class of action in which it may be paid in. The money here was paid under admitted liability. The other branch of the rule applies to actions other than libel and slander, where liability is not admitted. The case, therefore, stands thus: the defendants had the right both under the rule and under the section of the statute above referred to, to pay in a sum of money in satisfaction of the plaintiff's demand. They had also the right to the protection of said rule 22, which prohibited any mention to the jury of the fact of payment in, or of the amount paid in. In the face of this statutory rule, counsel for the plaintiff told the jury that $5 had been paid into Court by the defendants. What he first said does not appear in the record, but what he said in explanation or by way of withdrawal quoted above indicates the nature of it. This sentence, "They seem to imply that some very trifling sum is all that is necessary," emphasizes what the rule is intended to guard against, using the fact and the amount of

payment as a weapon to influence the jury. The case is analogous to those which have arisen under the section of the Canada Evidence Act, prohibiting comment on a prisoner's failure to testify: see *The Queen* v. *Coleman*, 2 Can. Cr. Cas. p. 523. There an attempt was made to correct the error by directing the jury to disregard the comment, but it was held that the wrong had been done and could not be undone. In this case no attempt was made to correct the wrong; what was done rather tended to aggravate it. As the case was not tried according to law, and as the prohibited comment was calculated to and well may have had some influence with the jury in determining the amount of damages, the judgment and verdict ought to be set aside and a new trial ordered.

IRVING, J.A. (dissenting):—The notice of appeal sets forth six grounds of appeal. Three of these, viz., 2, 3 and 6, were argued before us. As to the second, the amount does not seem to me to be so excessive as would justify our interference. Where there is nothing objectionable in the charge, it is difficult for a Court of Appeal to interfere with the amount: see *Higgins* v. *Walkem* (1889), 17 Can. S.C.R. 225, even if the Court of Appeal would not approve of so large an award.

As to the third, I agree with the plaintiff's counsel that the questions were not sufficiently pressed at the trial, and I also am of opinion that his objection that the notice of appeal does not sufficiently raise the points the appellant wishes us to deal with was well taken.

The cross-examination was conducted in a very loose and indefinite manner, and I find difficulty in coming to any conclusion but this, viz.: the counsel for the defendants acquiesced in the ruling of the trial Judge and in deference to his ruling did not press the question.

The defence was that the defendant's Police Court reporter had misunderstood the magistrate when he, the magistrate, stated that he would reserve his decision; the reporter thought, it is said, that he said he would reserve sentence. It seems to me that on the pleadings the burthen of supporting the defence rested mainly on the evidence of the reporter, who had made the blunder. It was admitted that it was a blunder.

Counsel for the defendant put certain questions to the plaintiff on cross-examination, and to these Mr. Ritchie objected that if the intention was to bring out by these questions what had been said in the Police Court by the witnesses, the proper method of proof was to produce the notes of evidence taken down by the official stenographer. That undoubtedly would be the best evidence of what the sworn testimony was; but other evidence of what was said would be admissible. But the depositions as a rule should first of all be put as in *Rex* v. *Prasiloski* (No. 2), 16 Can. Cr. Cas. 139, 15 B.C.R. 29.

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So far as I can see, all the questions actually asked might very well have been answered without infringing any rule of evidence, but the objection by Mr. Ritchie and the ruling by the learned trial Judge took a wider range.

It seems to me, as I have said, that the defendant's counsel acquiesced in the ruling and allowed the matter to drop, afterwards he returned to it, but the learned trial Judge refused to allow any cross-examination as to what had taken place in the Police Court. I think the questions asked were not in themselves objectionable, unless on grounds of irrelevancy, and should have been answered.

The ruling of the Judge that the proper way to prove what took place in the Police Court was by the production of the depositions, is correct enough, but the questions hardly went that far. The appellant, in my opinion, is endeavouring to make a point of something which has no importance, as it was admitted that their reporter had made a blunder.

As to the sixth ground. It appears from Odgers' work on Libel that rule 275a applied to libel actions; but in the absence of authority I should have been of opinion that the plaintiff's counsel in a libel action had a right to call the jury's attention to the insignificant sum paid into Court by the defendants "as satisfaction of the plaintiff's claim" as an aggravation of the libel.

The rule being applicable, and having been violated, should we order a new trial. I think not, as the defendant's counsel did not ask to have the jury discharged. Defendant's counsel drew attention to the violation of the rule, by saying that he did not waive any right by reason of counsel drawing the attention of the jury to page 4 of the statement of defence. Mr. Ritchie apologised and withdrew the statement. The matter was then allowed to drop. I think the defendant's counsel should have applied to the Judge to discharge the jury if he thought he was prejudiced. See the remarks of Boyd, C., in *Sornberger* v. *C. P. R. Co.*, 24 O.A.R. 263, at 272.

The appeal in my opinion is altogether frivolous and should be dismissed with costs.

Martin, J.A.

MARTIN, J.A.:—We should first deal with the objection taken at the beginning of the trial, that the plaintiff's counsel, in opening the case to the jury, communicated to them both the facts prohibited by rule 275a, viz.: (1) that money had been paid into Court, and (2) the amount paid in. The rule further directs that—

> the jury shall be required to find the amount of the debt or damages, as the case may be, without reference to any payment into Court.

Fortunately we have the view of the Court of Appeal on the rule in the case of *Williams* v. *Goose*, [1897] 1 Q.B. 471, 66 L.J.

Q.B. 345, wherein the scope of it was considered on February 25-26, 1897, and it was held that it provided "in terms" that the issues should be put before the jury in a particular way, and the Judge could not depart therefrom by submitting other issues to them. Lord Justice Lopes said, p. 347:—

> I am strongly of opinion that it is a most wholesome rule.

And the Master of the Rolls thus referred to an assertion respecting a ruling of the Lord Chief Justice, p. 346:—

> It was asserted that the Lord Chief Justice had declared the rule to be *ultra vires*, but I do not think he ever did so. There was, it seems, a case before him which he did not think came within the rule, and if that case comes before us we shall have to say what view we take of the matter, but at present nothing has been brought to our notice of which we can take cognizance.

In *Klamborowski* v. *Cooke* (1897), 14 Times L.R. 88, a libel action, which came before the Lord Chief Justice Russell on the 1st of December in the same year, the plaintiff's counsel in opening the pleadings told the jury that money had been paid into Court, and on this being objected to as being contrary to the rule, the learned Lord Chief Justice held it was so, saying:—

> That is so, but in my opinion the rule is a very foolish one and works out very inconveniently. I think it would be much better that the jury should know when money has been paid into Court. As, however, the learned counsel has now informed the jury, we may as well "go the whole hog" and tell them the amount,

which was done. This decision is, of course, when carefully read, really in favour of the defendants' objection at bar, and a later authority directly in support of it, also in a libel action, is *Veale* v. *Reid* (July 11, 1904), 117 L.T.Jo. 292, wherein Mr. Justice Ridley held that "the fact that money had been paid in must not be mentioned to the jury." See also *Jaques* v. *South Essex Waterworks Co.*, decided on June 3rd, 1904, 20 T.L.R. 563, wherein Lord Chief Justice Alverstone adopted the same course in an action for personal injuries where payment in was accompanied by an admission of liability.

In my opinion it is clear on these authorities that the objection, which I may say I consider a very substantial one, should have been given effect to by the learned trial Judge and the jury discharged of his own motion and directions given for a rehearing pursuant to the practice set out in the Annual Practice, 1912, p. 387. The remarks of the plaintiff's counsel to the jury could not cure his mistake or avoid its consequences. It is therefore unnecessary to consider the other point raised.

The appeal should be allowed with costs and there must be a new trial, the costs of the former trial should, in the circumstances, be given to the defendant in any event of the cause.

GALLIHER, J.A.:—I agree that there should be a new trial. Galliher, J.A.

Appeal allowed, IRVING, J.A., *dissenting*.

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Feb. 13.

ALFRED & WICKHAM v. GRAND TRUNK PACIFIC R. CO.

Alberta Supreme Court, Scott, Stuart, Beck and Simmons, JJ.
February 3, 1912.

1. APPEAL (§ III C—90)—NOTICE OF APPEAL—INSUFFICIENCY.

A notice of appeal is insufficient where the grounds stated therein are (1) that the judgment appealed from is against the law, evidence, and the weight of evidence; (2) that the trial Judge erroneously admitted and excluded evidence, and (3) that the judgment was erroneous "upon such other grounds as may appear in the pleadings and proceedings," such alleged grounds being too undefinite. (*Per* Beck, J.)

2. APPEAL (§ IV D—125)—RIGHT TO BRING BEFORE APPELLATE COURT A QUESTION NOT RAISED BY THE NOTICE OF APPEAL.

A question not going to the merits of a case and not raised by the notice of appeal, cannot be brought to the attention of the Court by a supplementary or "explanatory" notice of appeal. (*Per* Beck, J.)

3. DAMAGES (§ III A 1—44)—RAILWAY CONSTRUCTION—CONTRACT NOT AWARDED—COST OF SUPPLIES AND TEN PER CENT. AS AN AGREED ALTERNATIVE.

Where a railway company was unable to definitely award the plaintiff a contract for constructing a portion of its road, but agreed with him, that in order to keep his teams employed during the winter, he might put in supplies necessary for the construction of so much road as he could complete during the working portion of the following summer, and that the company would guarantee him, in the event of its being unable to award such contract, the cost of such supplies, together with ten per cent. advance thereon, the company, upon not being able to award the plaintiff such contract, is liable to him for such advance upon the total cost of the supplies, and also for the loss sustained by him on a sale thereof after due notice to the company.

4. CONTRACTS (§ I B—6)—IMPLIED AGREEMENT—RAILWAY CONTRACTOR'S SUPPLIES PLACED ON WORK—CONTRACT NOT AWARDED—TELEGRAM GUARANTEEING COST AND TEN PER CENT.

Where a railway company which was unable at the time to definitely award a contract, by telegram guaranteed to the plaintiff, that in the event of a contract for the construction of a portion of its road not being awarded him, the cost, as well as ten per cent. advance on all contractor's supplies placed by him on the ground, upon it becoming apparent that such contract would not be awarded him, a new contract does not arise from a subsequent promise of the company to assume the liability imposed by such telegram; such promise was, however, an admission that the alternative provision for paying such cost and percentage had come into effect.

5. DAMAGES (§ III A 1—44)—BREACH OF GUARANTY—COST OF CARRYING INSURANCE ON SUPPLIES—LIABILITY FOR.

Where a railway company, upon its failure to award the plaintiff a contract for constructing a piece of railway, did not pay him the value of construction supplies he had provided, and for which the railway company had agreed upon that contingency to pay for, the plaintiff becomes entitled upon the company's default to the cost of insurance carried on the supplies only after the time when the defendant became liable to pay for such supplies, when such insurance would be justifiable as in protection of the plaintiff's lien as an unpaid seller. (*Per* Simmons, J.)

Statement

APPEAL by the defendants from judgment of Harvey, C.J., upon the findings of a jury.

The appeal was dismissed.

E. B. Edwards, K.C., and *J. E. Wallbridge*, for plaintiff (respondent).

S. B. Woods, K.C., for defendants (appellant).

SCOTT, J.:—I concur in the judgment of Beck, J.

STUART, J.:—In my opinion the decision of this appeal lies within a very narrow compass.

It is abundantly clear from the telegram from Mr. Morse to Alfred of November 30th, 1908, that Alfred was promised either a contract for the first forty miles west of Wolf Creek or such part thereof as could be completed in 1909 or that if such a contract was not given him the company would purchase from him at cost plus ten per cent. the supplies he might take in during the winter. It is clear that this promise was made as much in the interest of the railway company as in the plaintiffs' interest. Morse says in his letter of December 4th, that he is "just as anxious as you are to conclude the arrangement." This, no doubt, referred to a definite contract but it shews that the general manager was anxious to have arrangements made for pushing the work in 1909 and obviously the company's contractors could get along faster if their supplies were taken in in the winter so as to be on hand.

The plain meaning of the letter and telegram is that the plaintiffs were to get a contract for such work as they could do in 1909 and that if they did not then the company would take over their supplies. Obviously the plaintiffs could not do all that was possible to do during the season of 1909 unless by the time that season opened they knew whether or not they were to be allowed or engaged to do anything at all. Under the true interpretation of the document, therefore, the obligation lay upon the company to award a contract to the plaintiffs before the season opened or to fulfil their alternative promise to take over the supplies. The defendants admit that they took upon themselves the risk of inability or unwillingness on their own part to award a contract to the plaintiffs; but they apparently wish the court to assume that difficulties or uncertainties in the superior management of the company's affairs leading to a delay in awarding any contracts at all are not within the risk they took upon themselves; and that the plaintiffs should have been content to get a contract awarded to them, no matter when, provided it was done as soon as any contract was awarded to any one whatever. This, however, is, in my view, not the true position. On the contrary, if the defendants were not in a position for any reason, no matter what, to award a contract to the plaintiffs in time to allow them the full working season of 1909 to complete it in, then, as I interpret the contract, they were bound to take over the supplies as arranged. It is admitted that Mr. Chamberlain's hands were tied until the 5th of June, and that for some time even after that date the plaintiffs were not informed that a contract could now be definitely awarded, and that at that date a considerable of the working season had

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already gone by. This being so, I see no necessity for considering the question of the amendment asked for in regard to a special contract in February nor indeed for considering the question whether or not there had been a definite recognition by the company's officials that their alternative obligation to purchase the supplies had now arisen. That was, it is true, a proper question to leave to the jury, but whether there was such a recognition in fact or not it is quite plain to me that the jury were properly instructed to consider whether the offer of a contract made on July 8th was not really too late to be taken as a fulfilment of the first alternative obligation. Whether that was a question of law or not is now of little moment. If it is a question of law, I agree with the learned Chief Justice that it was too late. If it is a question of fact, then, if it is necessary to support the verdict, we must assume that the jury also so found under the directions quite properly given them by the trial Judge.

The company refused to purchase the supplies "at cost plus ten per cent." and the plaintiffs after giving the proper notice under the Sales of Goods Ordinance sold the goods at what is admitted to have been the best price they could get. The jury gave the plaintiffs a verdict for $55,148.59. It does not appear how the jury made up this amount. We cannot necessarily assume that they allowed any particular item objected to. All we can do is to enquire whether or not it was possible for the jury, as reasonable men and allowing only such claims as are legally allowable at all, to arrive at that amount. If it was possible for them to do so then the verdict must stand.

My brother Simmons has carefully and labouriously examined the various statements produced at the trial in the light of the evidence given, and I have associated myself with him in that work. I agree with the conclusion at which he has arrived, that the jury could properly allow the amount for which the verdict was given.

The appeal should be dismissed with costs.

Beck, J.

BECK, J.:—This is an appeal from the judgment of the Chief Justice upon a verdict of a jury.

The notice of appeal took the following grounds:—

1. That the said judgment is against law, evidence and the weight of evidence.

2. That the learned trial Judge erroneously held that the general manager of the defendant company had authority to enter into the contract sued upon.

3. That the learned trial Judge wrongly held that there was any evidence that the defendant had constituted any breach of the said contract.

4. That on the evidence, the verdict of the jury was perverse.

5. That the learned trial Judge erroneously admitted evidence and erroneously excluded evidence.

6. And upon such other grounds as may appear in the pleadings and proceedings.

Under our practice I think that items 1, 5 and 6 were insufficient because too indefinitely stated.

On the 16th August, this was followed by a notice which was stated to be "supplementary or explanatory" in which the grounds were stated as follows:—

1. Morse's telegram of the 30th November, 1908, did not constitute a contract owing to the absence of the seal of the defendant and of Morse's authority to commit the defendant to any such engagement.

(a) The telegram was addressed to Alfred and the plaintiffs are not competent to maintain this action as there was no privity of contract between the defendant and the firm of Alfred and Wickham, or any co-relative right or remedy which the defendant could enforce against that firm. To constitute a contract there must be reciprocal obligations and unilateral contract.

2. Even if Morse's telegram constituted a valid contract there was no breach thereof as the work for the 40 miles referred to was duly tendered to Alfred and declined by him.

3. Even if it should be held that a contract existed and was broken by the defendant, the damages are grossly excessive, as the cost of the supplies is conclusively fixed by the re-sale to Stewart and the measure of damages would be simply the price received by Alfred for his supplies from Stewart.

4. That under the circumstances disclosed in the evidence, Alfred was not entitled to payment of ten per cent. of cost; but if he should be held entitled to such ten per cent. the cost would be the price at which the goods were taken over by Stewart.

This notice again was followed by a further notice on the 15th September, as follows:—

Take notice, that pursuant to your request for further details, touching the grounds of appeal, the appellant proposes to put his case, generally speaking, before the Court upon the following grounds:

1. That the appellant is entitled to have the application for a non-suit made at the trial granted on the grounds:—

(a) That no contract is proved by the appellant with the respondents on the record.

(b) Because if such a contract was made by the correspondence had between the respondents Alfred and Mr. F. Morse, the then vice-president and general manager of the appellant, such contract was performed and satisfied upon the respondents' testimony in February, 1909, when they were given a contract such as was within the contemplation of the parties when the original transaction as evidenced by the said correspondence took place.

(c) That the respondents' evidence at the trial was not directed towards proving and did not prove a breach by the appellant of its agreement to procure the respondent a sub-contract from Foley, Welch & Stewart.

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(*d*) That no case is made upon the pleadings founded upon the interview had between the respondent Alfred and Mr. Chamberlain, the general manager of the respondent company at Winnipeg, in April, 1909.

2. That the verdict of the jury was grossly excessive and perverse upon the question of damages, and particularly that the jury had no power as a matter of law to award interest as a part of their verdict, and that having done so and the amount of their verdict being one lump sum and it being impossible to separate the amount so improperly awarded for interest from the amount awarded by them as damages, that there has been a mis-trial.

3. That in any event the case should not have been left to the jury with the instructions that, if they believed the statements of the respondents' witnesses to the effect that in April, 1909, it was decided to declare the whole matter off as far as the giving of the contract was concerned, the jury would have to consider that from that time the question of contract was at an end and that the appellant was responsible for the price of the goods with ten per cent. added (see Judge's charge, page 332), because no case was made out upon the pleadings entitling the trial Judge to leave that matter to the jury in this way.

4. That the trial Judge should not have told the jury that if they thought it was not reasonable to expect the respondents to take a contract in June, then the jury would be entitled to conclude that the company was responsible for the value of the goods taken in, there being no such issue raised upon the pleadings, and no evidence directed towards any such issue. And upon the other grounds already taken in the notice of appeal and supplementary notice of appeal served herein.

I would not permit the defendant company to raise now any ground, not going to the merits of the case, which was not open under the original notice of appeal; and on the argument I said to Mr. Woods, counsel for the defendant company, that for my part I would not be ready to consider any grounds, going to the merits, which were open under the original notice of appeal if he persisted in pressing what I thought were unmeritorious grounds and I understood him to say that if he were allowed to go into the real merits of the case, namely, the question of the interpretation and effect of the agreement, its breach and the proper amount of damages, if any, he was satisfied to abandon the other grounds. I think, therefore, that this appeal should be dealt with only on these latter grounds.

The contract in question is contained in a telegram sent by Frank W. Morse (then vice-president and general manager of the defendant company) to the plaintiff Alfred as follows:—

Montreal, November 30th, 1908.

Frank H. Alfred, Esq.,
Edmonton, Alta.

Unable to at this time definitely award contract for the forty miles you desire. In order to keep your teams employed this winter, will

say that if you will put in necessary supplies for such of this forty miles as you can complete in 1909, we will guarantee you cost and ten per cent. on same, in case anything should happen that it would be impossible to award you the contract.

FRANK W. MORSE.

As a result of this arrangement the plaintiffs shipped into the territory where it was contemplated the work should be done, a large quantity of such supplies as they would require in the event of a construction contract being eventually awarded to them. This was done mainly during the winter months of 1908-9 and in the spring of 1909 the last supplies being taken in about the middle of April. Sometime in January, 1909, Mr. Chamberlain became vice-president and general manager of the defendant company in succession to Mr. Morse.

Alfred met Chamberlain in Winnipeg on the 21st April, 1908, and conferences took place between them. The evidence as to what took place at those conferences is conflicting. Alfred's version is confirmed, however, by letters. On the 26th April, Mr. Kelliher, the chief engineer, wrote Chamberlain as follows:—

In compliance with your instructions of the 23rd inst., and returning Mr. Alfred's letter of the 22nd inst. which accompanied it, I wish to inform you that I immediately issued instructions to Division Engineer Jones to check up receipts, etc., for all supplies put in by Mr. Alfred on the work west of Wolf Creek as per his former arrangement with this company, prepare a complete itemized statement of quantities and cost of all the supplies found on the work put in by Mr. Alfred.

During the period that Mr. Alfred was putting in the supplies we kept a man especially on the ground to check receipts for these supplies, and Mr. Alfred informs me that he also had him endorse cheques for payment. From this there should be no difficulty in making an absolutely correct list which would supply all the data ready for transfer to Mr. Stewart or for voucher by this company for payment to Mr. Alfred whichever course is adopted.

This letter was written en route to Montreal and was acknowledged by Mr. Chamberlain by letter to Kelliher:—

Referring to your letter of the 26th relative to supplies placed on line 40 west of Wolf Creek by Mr. Alfred, I wish as soon as you obtain this itemized statement that you would forward same to me so that I may take it up with Mr. Stewart.

Mr. Stewart was a member of the firm of Foley, Welch & Stewart, large contractors who, owing to their connection with the defendant company, were the parties with whom, under either view of the effect of the April conference, naturally arrangements would be made for the taking over of the plaintiffs' supplies. I would, therefore, accept as correct the reasonable account given by Alfred. At all events the jury might well accept it and the question of the result of those conferences was

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quite distinctly put to them by the learned Judge's charge in this way:—

> If you believe on the testimony of the plaintiffs' witnesses that it was then decided that in view of the fact that the contract could not then be let, that the whole matter would be declared off as far as the contract was concerned, and the company would assume the liability of the original telegram, and undertake to be responsible for the cost of the goods and ten per cent., then I think you would have to consider that from that time on the question of contract was at an end and the defendants were responsible for the price of the goods with the ten per cent. added, and again, if, as I say, you come to the conclusion that at the interview in April it was accepted by Mr. Chamberlain that the question of the contract should be put an end to and the company should become responsible for the supplies, that disposed of all the case, I think, and I do not think you need to concern yourselves any more because the plaintiffs could not be expected then to take any contract after that.

Counsel for the defendant company object to this way of putting it to the jury on the ground that what took place at these conferences, even taking the plaintiffs' version, must necessarily be taken as constituting a new contract and that no such contract is alleged in the pleadings. There is, I think, more than one answer to this. I think there was not a new contract but a distinct admission by the defendant company that the circumstances had become such that the company could not award the plaintiffs the construction contract as originally contemplated and consequently that the alternative provision for payment by the company had come into effect. This aspect of the case was put with sufficient distinctness in the statement of claim and in any case it is clear that all the available evidence bearing upon what took place at those conferences was given and that being so, full effect should be given to it irrespective of the form of the pleadings.

Taking this view, which the whole circumstances of the case convince me was in effect the view taken by the jury, I do not think it necessary to follow in detail what took place subsequently, because even if the jury by possibility took a different view of the case up to this stage it is obvious that they must have found with relation to subsequent matters entirely in the plaintiffs' favour and I do not see how they could reasonably have found otherwise.

The amount of the damages awarded is questioned. The amount claimed was $66,038.59. The amount of the verdict is $55,148.59. The difference is $10,890.00. This difference seems to cover all amounts which it can fairly be contended were not properly included in the particulars of the plaintiffs' claim.

I would, therefore, dismiss the appeal with costs.

SIMMONS, J.:—The plaintiffs are railway contractors, and Alfred, one of the plaintiffs, during the latter part of the summer and during the fall of 1908, entered into correspondence with Frank W. Morse, vice-president and general manager of the defendant company, soliciting from Mr. Morse a contract for construction on defendant's railway then being built between Edmonton and the Mountains, and in reply to Alfred's enquiries Mr. Morse sent Alfred the following telegram from Montreal on November 30th, 1908:—

Montreal, Nov. 30th, 1908.

Frank H. Alfred, Esq.,
Edmonton, Alta.

Unable to at this time definitely award contract for the forty miles you desire. In order to keep your teams employed this winter will say that if you will put in necessary supplies for such of the forty miles as you can complete in 1909, we will guarantee you cost and ten per cent. on same in case anything should happen that it would be impossible to award you the contract.

(Sgd.) FRANK W. MORSE.

and on December 4th, 1909, wrote Alfred the following letter:—

Dear Mr. Alfred,—I enclose copy of message sent you on November 30th and one of even date. Have before me your letter of the 29th.

I fully understand your anxiety and strong desire to have this matter settled, and am just as desirous as you are to conclude the arrangement. However, owing to our president being abroad, and the exact scope of our operations next year not having been determined, and not wishing in any way to mislead you, which might later on result in embarrassment and loss to you, am using my best judgment and caution in advising you.

Yours very truly,

FRANK W. MORSE.

Mr. Frank H. Alfred,
c/o Mr. R. W. Jones,
Division Engineer, G.T.P.,
Edmonton, Alta.

Encl.

and on December 10th, 1908, Mr. Morse wrote Mr. Alfred as follows:—

December 10th, 1908.

Mr. Frank H. Alfred,
Alberta Hotel,
Edmonton.

Dear Sir,—I have your note of December 1st, acknowledging receipt of my telegram of the previous day reading as follows:—

"Unable at this time to definitely award contract for the forty miles you desire. In order to keep your teams employed this winter, will say that if you will put in necessary supplies for such of this forty miles as you can complete in 1909, we will guarantee you cost and ten per cent. on same, in case anything should happen that it would be impossible to award you the contract."

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With a view to having at hand all necessary information in connection with your expenditure for supplies in the event of your not obtaining the contract, will you please have made up as soon as possible after the close of each month, a statement of your expenditures, accompanied by copies of bills, invoices, etc., and submit to Mr. R. W. Jones, our division engineer at Edmonton, giving him an opportunity to check receipt of supplies into the storehouse, as well as to keep check on number of teams, men, etc., engaged in the work of transportation and delivery. Mr. Jones will be instructed by Mr. B. B. Kelliher, chief engineer, to give the matter attention on the lines mentioned.

Please acknowledge receipt.

Yours truly,

FRANK W. MORSE,
Vice-President and General Manager.

And on December 15th, 1908, Mr. B. B. Kelliher, chief engineer of the defendant company, under instructions from Mr. Morse wrote R. W. Jones, divisional engineer of defendant company as follows:—

Montreal, Dec. 15th, 1908.

PERSONAL.

Mr. R. W. Jones,
Division Engineer,
Edmonton, Alta.

Dear Sir,—For your information I attach copy of correspondence referring to the putting in of supplies this winter on the first forty miles west of Wolf Creek.

Discuss this subject with Mr. Alfred and keep in close touch with the expense he incurs in putting in supplies so that you will be able to certify to the expenditure. This in order to make an amicable settlement of accounts in the event of anything unforeseen occurring that would make it impracticable under our present arrangement for Mr. Alfred to carry out the work. Make me monthly reports on this subject accompanied by duplicate copies of all bills, and all other expenses incurred by Mr. Alfred.

Yours truly,

B. B. KELLIHER,
Chief Engineer.

Encl.

In pursuance of the arrangement set out in above correspondence, the plaintiff who had associated with himself the plaintiffs B. P. Wickham and E. A. Wickham, commenced shipping supplies to McLeod River and Big Eddy on the line of the proposed construction work. Prior to November 30th, 1908, Mr. Alfred had filed with Mr. Morse a tender for forty miles of construction westward from Wolf Creek and Kelliher disclosed to Alfred the tender of Foley, Welch & Stewart, railway contractors for the same work, and Mr. Kelliher admits it was in the interest of the defendants to have competing tenders. The supplies were shipped by rail on the C.N.R. to Stoney Plain, a

point about seventeen miles west of Edmonton, and transported on sleighs for a distance of about one hundred miles to McLeod River and Big Eddy. It appears that in order to carry on construction work in the following summer it was necessary to get in supplies during the winter when the ground was frozen as the character of the country rendered it impracticable to do the shipping in the spring and summer. In January, the plaintiff Alfred advised Mr. Morse of progress in the transportation of supplies by letter as follows:—

Edmonton, Alta., January 7th, 1909.

My dear Mr. Morse,—I have already contracted for a large supply of oats and am closing for a supply of hay and have started freighting west. We could not commence freighting earlier as the snow came the last of December. I have kept the arrangement absolutely to myself (except for Mr. Wickham who understands) yet it is getting about that we are freighting west. I sent a party to the Big Eddy on the McLeod last month to erect warehouses and we purchased a number of heavy sleighs for freighting, which I think has caused those interested to wonder.

I am completing my arrangements with the White company for the plant on the strength of getting the contract. I have put them off so long that they (and justly too) have pressed me for a final conclusion of our arrangement.

I hope you can wire or write me that you are now in a position to definitely award us the contract for the forty miles west from the McLeod river. It will help us very much to be able to have all sub-contracts that we intend giving out made as early as possible.

I am busy with details of freighting and would prefer to complete the formality of the contract without coming to Montreal this month, although we stand ready to come whenever necessary and convenient to you.

It has been intensely cold for several days. The temperature registering 50 degrees below last night and several reports indicate as low as 56 below. It is 34 below in the sun as I am writing at 2 p.m.

Yours truly,

FRANK H. ALFRED.

to which Mr. Morse replied by letter of January 13th, 1909, in the following telegram and letter:—

Montreal, January 13th, 1909.

Frank H. Alfred, Esq.,
c/o Alberta Hotel,
Edmonton, Alta.

Letter seventh received. Glad to note progress you are making. Am writing.

FRANK W. MORSE.

January 13th, 1909.

Dear Mr. Alfred,—Yours of January 7th received, and I have wired you as per enclosed. Can readily understand that you could not purchase sleighs and supplies and start transporting the latter, with-

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out same being observed and comment being made. No harm can come from this; the only thing is, let us not advertise it ourselves.

The conditions relative to letting contracts are the same as when I last wrote you. You have no cause for apprehension or worry, as the work will have to be done, and you will be in a better position than anyone else. I know that it will be a great relief to have concluded matters, and trust we may have the satisfaction of doing so in the near future.

Trusting that the year will prove a prosperous and happy one for you, I beg to remain,

FRANK W. MORSE.

The plaintiff continued shipping supplies during the months of January, February, March, and the early part of April and the defendants pursuant to the arrangements made, had the supplies checked under the direct supervision of their divisional engineer, Mr. Jones.

About the end of January, Mr. Morse retired from the position of vice-president and general manager of the defendant company and was succeeded by E. J. Chamberlain and at Chamberlain's request a meeting took place at Winnipeg on February 2nd, 1909, between the plaintiffs and Mr. Chamberlain and B. B. Kelliher and they suggested to the plaintiffs that the plaintiffs should accept a contract from Foley, Welch & Stewart at the price of plaintiffs' tender made in the fall of 1908 and that the mileage be 23 miles instead of 40 miles with the privilege of the plaintiffs to receive further mileage if they should be able to undertake it and to this the plaintiffs agreed. The plaintiffs state they understood the defendants were to make all the arrangements with Foley, Welch & Stewart. Plaintiffs continued during February and March and the first part of April, furthering their arrangements to commence active construction work as soon as spring opened and in the latter part of the month of April failing to get any positive assurance either from defendants or from Foley, Welch & Stewart that they would be awarded any contract or given any work on the railway construction, the plaintiff Alfred went to see Chamberlain at Winnipeg on April 20th, 1909, and an interview took place between them (about which there is a considerable conflict of evidence). It is quite beyond dispute that Chamberlain admitted the defendant company were not in a position then to award any contract either direct or through Foley, Welch & Stewart. Alfred says Chamberlain proposed that plaintiffs try and make an arrangement with Foley, Welch & Stewart to take over the supplies and that he, Alfred, refused to do so and had insisted that the time had arrived when plaintiffs had the right to demand that defendants take over the supplies under the terms of the telegram of November 30th, 1908, paying actual costs and ten per cent. and that Chamberlain agreed to do so.

Chamberlain says he did not go further than to undertake to negotiate for the plaintiffs with Foley, Welch & Stewart with a view of getting the latter to take over plaintiffs' supplies. Under directions from Chamberlain, Kelliher issued instructions to Mr. R. W. Jones, divisional engineer, to check over the supplies as "It is proposed that we take over the supplies that Mr. Alfred put in some months ago west of Edmonton" (extracts from Kelliher's letter to Jones). "The arrangement is that we take the supplies over from Mr. Alfred and pay *him* and have Stewart take over the supplies from us and refund to us what we paid Alfred."

The supplies were checked under the direction of Mr. Jones and some six weeks was occupied in doing this. On June 23rd, Jones, having completed the checking, forwarded a statement of same (exhibit 35) to Mr. Kelliher and on June 16th, 1909 and June 25th, plaintiffs demanded from defendants payment for same or a payment on account.

On June 21st defendants let a contract to Foley, Welch & Stewart for construction west of Macleod river and plaintiffs met Chamberlain, Kelliher and Stewart at Edmonton on July 7th and 8th and plaintiffs renewed their demand for payment. Chamberlain suggested they arrange with Stewart to have him take over their supplies or, in the alternative, take a sub-contract from Foley, Welch and Stewart, or a contract direct from defendants. The plaintiffs refused to consider a sub-contract or a contract direct from defendants as they had parted with part of their plant and transferred their supplies to defendants and it would be impossible for them to attempt to undertake a construction contract at that late date.

Plaintiffs then gave notice to the defendants under the Sale of Goods Ordinance of their intention to sell the goods, and, having sold them at a loss, brought this action to recover their loss. The jury assessed damages against the defendants in the sum of $55,148.59 and against this finding the defendants appeal.

In his charge to the jury, the learned Chief Justice left it to them to say whether, at the interview in April at Winnipeg, it had been agreed between the parties that the whole matter in so far as awarding a contract to plaintiffs had been declared off and the company had agreed to take over the supplies in accordance with the telegram of November 30th, 1908, and in the alternative whether the offer of the defendants in July, 1909, to award the plaintiffs a contract was in compliance with the terms of the telegram.

There is nothing to indicate on which of these the jury found against the defendants but there seems clearly to be evidence on either of which, if believed by the jury, their finding

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can be supported. If they believed the plaintiffs' version of what took place at the interview in Winnipeg in April, then the defendants agreed to assume the obligation of paying for the goods on the terms of the telegram of November 30th, 1908, and the acts of defendants for some six weeks after this interview are not inconsistent with this conclusion. On the other hand, if the jury based their conclusion on the grounds that the offer of July was not a compliance, that would seem to be reasonable under the circumstances. The plaintiffs could hardly, under the circumstances, be expected to commence at that late date to carry out a somewhat large contract which it would seem clear was to be completed in 1909. The contracting season was about half over, they had very little time to get in plant and machinery and the season was quite unsuitable for transporting plant and machinery.

In view of this, then, the question as to whether the damages were excessive is then the only issue to dispose of.

It is a somewhat difficult one to deal with in view of the fact that counsel for the defendants on the appeal relied upon certain inferences which he claimed to be supported by the evidence and which were apparently not urged by counsel at the trial and to which I shall subsequently refer.

During the period that the supplies were being shipped by teams from Stoney Plain, a check of amounts and prices was furnished by plaintiffs to defendants at the request of the defendants. Mr. Morse instructed Mr. Kelliher, chief engineer, in regard to this checking on December 7th, 1908. The goods were re-checked at the caches at McLeod river and Big Eddy by the plaintiffs and defendants, both having representatives. The checking began about May 1st, 1909, and occupied about six weeks, and from this checking exhibit 35 was prepared by plaintiffs and, after revision by R. W. Jones, who was supervising the checking, pursuant to instructions from Kelliher, was forwarded by Jones to Kelliher under letter of June 23rd, 1909:—

Edmonton, Alberta, 23rd June, 1909.

Mr. B. B. Kelliher,
Chief Engineer,
Winnipeg, Man.

Dear Sir,—I enclose herewith statement of supplies at present cached by Alfred, Wickham & Co., at McLeod river and Big Eddy. At the bottom of the statement of supplies at McLeod cache I have summarized all expenditures in connection with these supplies.

I have in all cases where practicable reconciled the quantities with invoices furnished by Mr. Alfred. In a number of instances though, such as cooking equipment, some grader repairs, etc., the stuff purchased for the contract which these people hold east of the Pembina river and bought last year, used during the summer and forwarded

west during the winter months. In these instances I have not been able to secure the original invoices, and in consequence have had to accept Mr. Alfred's prices. This also applies to the tents.

There is considerable shortage between this statement of supplies at present in the above mentioned caches and the amount purchased by Mr. Alfred and forwarded west, owing to shrinkage, etc., supplies being used for maintenance of cache keepers, helpers and teamsters, and amounts lost by freighters.

I attach a statement made by Mr. Alfred shewing amount paid to independent freighters for hauling out supplies, statement of wages paid to cache keepers and helpers, and also a bill for their own teams at $8.00 per day.

The item of insurance I have checked up against the cheque issued to Allan, Lang, Killam & McKay.

The board of checkers at Stoney Plain was checked up against the hotel bill at that point.

Item of freight to Stoney Plain I have taken from Mr. Alfred's books.

Mr. Alfred is preparing a bill shewing all supplies bought, crediting the company with board of his teams, etc., and intends to take a trip to Winnipeg in the near future, and will take this statement with him. He will also bring all invoices and records to substantiate his claim, but the actual amount of stuff at present stored at the McLeod cache and Big Eddy cache is as per attached statement.

Yours truly,

(Sgd.) R. W. JONES.
Division Engineer.

L. R.

P. S. Mr. Alfred has retained statement shewing number of days of their own teams, and will bring this with him when he goes to Winnipeg. I have, however, shewn the total number of days on statement.

and this was followed by a letter from Jones to Kelliher undated (exhibit 34), which is as follows:—

H. E. B.—Keep this on hand for reference. It is being arranged between Stewart and Alfred in Edmonton. B. B. K.

Mr. B. B. Kelliher,
Chief Engineer,
Winnipeg, Man.

Dear Sir,—With reference to statement of supplies shipped west by Mr. F. H. Alfred.

Owing to the rush in getting the statement to you, I was unable to check the extensions on the different items as carefully as I would wish, but to-day have gone over these and find the following errors. I would be glad if you would make alterations in statement sent you.

One bag of tapioca, 141 lbs., equals 138 lbs. net at 5¾c. should be $7.94.

One bag of currants, 87 lbs. equals 75 lbs. net, at 7½c., should be $5.62.

Two bags 168 lbs. equals 150 lbs. net at 7½c., should be $11.25.

Making a total at McLeod cache, $15,682.01.

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Big Eddy cache:—

39 cases of peaches, 975 lbs. (500 lbs. at 8c., 475 lbs. at 8¼c.), should be $79.19.

16 coffee pots at $5.56 per doz., should be $7.41.

Making a total at B'g Eddy cache, $33,291.15.

This will alter the total of summary at bottom of McLeod cache statement to $143,123.23.

Yours truly,

(Sgd.) R. W. JONES,
Division Engineer.

It would appear quite evident from Alfred's evidence, pages 34 and 48 that in his letter of June 25th, 1909, (exhibit 18), exhibit 19 is the statement referred to therein, and I think it is a fair and reasonable inference that Alfred was then basing his demand for compensation, in so far as the actual cost of the supplies is at issue, upon that statement, namely, exhibit 19. He advises the defendants that their division engineer has forwarded this statement and asks for a payment of $100,000 on account. Alfred's explanation of the discrepancy between these two statements, namely, between exhibit 19 and exhibit 35, which aggregate $153,030.88 and $143,123.33 respectively when corrected (see p. 83 of case) is as follows:—

On account of shortage in hay	$ 1,391.00
On account of shortage in oats	640.00
Goods used by checkers and cache keepers	2,800.00
Superintendence	3,000.00
Interest	2,613.33
	$10,444.33

or $520.55 more than the difference. The plaintiff Alfred computes the claim of plaintiffs at $159,610.53, after deducting $7,930 on account of plant and adding ten per cent. (see case, p. 85). The plant was sold for $6,360 and this amount should be deducted from the proceeds of sales, that is to say, from $111,549.93, leaving a balance of $105,189.40 as net proceeds of sale of supplies. The difference between this and $159,610.53 is $54,421.13. The trial Judge instructed the jury that they might add interest from the time the moneys were due and payable, if they found the defendants had improperly withheld payment of the debt. If the jury fixed the time of payment at the later date, namely, July 21st, 1910, and computed interest at five per cent., I find there would be approximately $5,579.87 added for interest, computed as follows:—

July 21, 1909, to Aug. 1, 1909, int. 5% on $159,610.53	$665.04
Aug. 21, 1909, to Sep. 21, 1909, int. 5% on $149,610.53	623.37
Aug. 21, 1909, to Sep. 21, 1909, int. 5% on $124,610.53	519.20
Oct. 23, 1909, to Mar. 3, 1911, int. 5% on $54,422.13	3,772.26
	$5,579.87

This sum of $5,579.87 added to $54,421.12 is $60,110, or nearly $5,000 more than the assessment by the jury.

At the trial (see case, p. 119) when the plaintiff was submitting evidence of John McNamara as to quantities of goods stored at McLeod and Big Eddy caches, Mr. Tate, counsel for defendants, said: "I will not dispute, as far as I know at present, the quantities of stuff that were there. I don't see that my learned friend need labour over that" (case, p. 119), and, "All I will say, I will not dispute the quantities of the goods, plant and material that are said to have been taken into the caches, that is all" (case, p. 120). Counsel on appeal (Mr. Woods) wished to qualify this and confine the plaintiffs to the statement (exhibit 35) as an admission of plaintiffs that exhibit 35 which was put in by the plaintiffs must be taken as against exhibit 19 where there was a discrepancy in favour of the defendants between the two statements. It seems quite evident that Mr. Tate did not take this view, and I do not think the plaintiffs should have to meet the contention of appellants in this regard before this Court. The only items making up the amount which seem to be a matter of contention, then, are insurance, $1,625; interest prior to July 21, 1909, $2,685.53; superintendence, $3,000, and the item of $37,176 for Alfred & Wickham's teams, 4,647 days at $8.00 per day.

As to insurance, I do not think the defendants could properly be charged with this unless the jury found that the period at which the defendants should have paid for the goods had arrived in April. They were instructed by the trial Judge that they might so find and if they did so, then the plaintiffs had a vendors' lien for the price of goods, and properly insured to protect their lien, and properly charged the insurance as a claim by virtue of their lien. The question of interest prior to July 21, 1909, would also depend upon which period the jury may have fixed the liability as arising. If in April, 1909, then the interest would properly be allowed, and if in July, it should be struck out.

As to item of $3,000 for superintendence, this seems to be an unreasonable amount. The time over which the superintendence extended was about six months, and a competent man to supervise such work should not have incurred an expenditure of more than, say, $150 per month or $900. I think this amount should be reduced by at least $2,000, as the ten per cent. above cost could not be interpreted as meaning anything more than actual cost, and plaintiffs have given no particulars of this item but put it in a lump sum apparently to cover the time and expenses of the three partners. They were contractors, and I think it was an ordinary risk of their business to look after the negotiations pertaining to securing contracts and preparing

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for the execution of them, and it could never have been contemplated by the parties that the ten per cent. would cover such as this.

As to the item made up of $8.00 per day for freighting by Alfred & Wickham's teams, there is considerable conflict of evidence. Stewart, of Foley, Welch and Stewart, says he could get teams to freight between these points at $6.00 per day, and Kelliher says the same. Stewart allowed plaintiffs $45.00 and $50.00 per ton for freight to these points, and it is not clear just what amount teams could earn at this rate. Plaintiffs estimated it at $8.00 per day and the trial Judge left it to the jury to say whether that was a proper charge. Their verdict does not indicate the rate allowed by them, but I think it is quite clear they did not allow more than $8.00, and I see no reason for disturbing their verdict in regard to this.

The statute governing the awarding of interest under which the trial Judge instructed the jury that they might add interest from the date on which the debt became due is:—

> In addition to the cases in which interest is by law payable, or may by law be allowed, the Court may in all cases where in the opinion of the Court the payment of a just debt has been improperly withheld and it seems to the Court fair and equitable that the party in default should make compensation by the payment of interest, allow interest for such time and at such rate as the Court may think fit: Ch. 20, Alberta Statutes, 1908.

In the computation I have made I allowed five per cent. interest from July 21, 1909, until judgment. The jury may have assessed interest at a higher rate, and quite properly so, under the above statute, and may have found the date when payment was improperly withheld as of April instead of July, 1909. Either or both of these circumstances would add considerably to the amount I have computed for interest. Allowing, then, a deduction of $2,000 or even eliminating altogether the charge of $3,000 for superintendence, there seems to be a considerable margin which the jury might have found over and above what they did actually find against the defendants, and their verdict should not be disturbed.

I would therefore dismiss the appeal with costs.

Appeal dismissed.

CANADIAN FRATERNAL ASSOCIATION v. CANADIAN PASSENGER ASSOCIATION.

File 19033.

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Feb. 9.

Board of Railway Commissioners. February 9, 1912.

1. CARRIERS (§ II B—26)—SPECIAL TARIFF FIXING REDUCED FARE—"FEE" FOR VISÉING TICKET.

In a special passenger tariff filed with the Board of Railway Commissioners specifying that the tolls to be charged persons attending a convention would be a one-way fare plus twenty-five cents, it is unnecessary to state that the twenty-five cents is a "fee" and is charged for the purpose of defraying the expenses in viséing the railway certificates entitling such persons to a return trip without the payment of a return fare.

2. CARRIERS (§ II M 2—287)—EXCURSION TICKETS—CHARGE TO PASSENGERS FOR STAMPING RETURN TICKET—TOLL—7 AND 8 EDW. VII. (CAN.) CH. 61, SEC. 9.

The charge made by a passenger association formed by the principal railway and steamship companies of Canada for viséing railway certificates entitling persons attending a convention who had paid a one-way fare to a return trip without payment of a return fare is a "toll" within the meaning of 7 and 8 Edw. VII. (Can.) ch. 61, sec. 9, defining "toll" or "rate" to mean and include "any toll, rate, charge or allowance charged or made either by the company . . . or by any person on behalt or under authority or consent of the company, in connection with the carriage and transportation of passengers," though in a special passenger tariff filed with the Board of Railway Commissioners such charge was stated to be a "fee" and to be made for the purpose of defraying the expenses of viséing the certificates.

3. CARRIERS (§ IV C—530)—GOVERNMENTAL CONTROL—POWER OF BOARD OF RAILWAY COMMISSIONERS AS TO EXCURSION RATES.

The Board of Railway Commissioners has no jurisdiction to compel railway companies to make special excursion rates.

4. CARRIERS (§ IV C—527)—POWER OF BOARD OF RAILWAY COMMISSIONERS —VISÉ OF CONVENTION TICKET—CHARGE.

A uniform charge of twenty-five cents included in a tariff of passenger tolls as a special charge to be added to single first-class fare on the sale of excursion or return tickets at single fare plus twenty-five cents, sold in connection with conventions and payable on viséing the tickets for free return, is not objectionable as a discrimination because of such extra charge being payable in respect of transportation for any distance within the excursion radius, and, where the total charge to the passenger is less than the authorized tariff allows for regular rates, the Board of Railway Commissioners will not interfere to annul or vary the visé charge.

5. CARRIERS (§ IV C—530)—BOARD OF RAILWAY COMMISSIONERS—JURISDICTION AS TO EXCURSION TICKETS.

The Board of Railway Commissioners has no authority under the Railway Act, R.S.C. 1906, ch. 37, to compel a railway company issuing tickets at special rates to 300 people or more to offer such privilege to a less number.

Statement

APPLICATION to prohibit the respondent from charging 25 cents for viséing railway certificates entitling persons attending meetings to return to their homes without payment of a return fare and to reduce the number of persons entitled thereto from 300 to 250 or 200.

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Statement

To avoid confusion, errors and more serious faults, the principal railway and steamship companies operating in Canada formed the respondent association with an office in Montreal, maintained in part by this 25 cent charge; and officials being sent to the different society meetings for the purpose of viséing the certificates of the members.

In the tariff filed with the Board the statement appeared that a fee of 25 cents was charged to defray the expenses of the special agent viséing the certificates—it was shewn that there was a yearly deficit in the expenses of the office which was made up by contributions from the railway companies, members of the respondent association.

The application was heard at Toronto, February 9th, 1912.

The applicant contended that the charge of 25 cents was not a toll under section 9 of ch. 61 of 7 & 8 Edw. VII., and that members travelling a short distance were unjustly discriminated against in favour of those travelling a longer distance by being compelled to pay such charge. The Board held that such charge was a toll or charge made in connection with the transportation of passengers and that it was covered by the tariff filed by the respondent; and also that the Board has no jurisdiction to compel the respondent to issue excursion rates or fix the number of persons entitled thereto.

Mr. McLean.

MR. COMMISSIONER MCLEAN dissented in part. In his opinion the 25 cent charge as described in the tariff did not fall within the definition of tolls in ch. 61, sec. 9 of 7 & 8 Edw. VII.

Lyman Lee, for the applicant.

W. H. Biggar, K.C., *Angus MacMurchy*, K.C., and *W. P. Torrance*, for the respondent.

Mr. Mabee.

THE CHIEF COMMISSIONER (HON. J. P. MABEE):—The contention of the applicants here is of a two-fold character. The first claim is that this 25 cent charge for viséing these certificates is not a toll within section 9 of 7-8 Edw. VII. ch. 61. The section referred to was drawn with the idea of covering every conceivable charge that a railway company, or any person on behalf of, or under the authority, or with the consent of the railway company could make in connection with the movement of traffic. Bearing that in mind, it has got to be construed liberally.

This 25 cent charge is made, we think, by the railway company in connection with the transportation of passengers. It is unfortunate that the clause in the tariff that has been referred to was worded as it is. It was not necessary to use the word "fee" and it was not necessary to set out in that clause that this charge was to be made with a view of defraying expenses. It does not say distinctly that it is intended to raise a fund to

defray the expenses of the special agent, but to defray expenses generally I should think would be the interpretation of those words. There is no more necessity of putting words "to defray expenses" in this document than there would be to put those words in any special freight or passenger tariff or any standard freight or passenger tariff that a carrier might file. Everybody knows that the law authorizes railway companies and carriers to levy tolls with the view first of defraying expenses; and then if, as sometimes happens, there is anything left over, it goes to those whose money has been put into the enterprise. Probably if the word "fee" in the expression I have referred to had not been in this tariff it might not have been open to, and probably would not have invited the attack that has been made upon it. We come to the conclusion that this 25 cent charge is a toll or charge made in connection with the transportation of passengers. That is the first thing we find.

Secondly, we find, possibly not without some hesitation, and admitting that the matter is arguable, that that 25 cent charge is covered by this tariff, although in the unfortunate form to which I have adverted, and that the railway company is within its right in making the charge.

I can understand how some of these delegates who attend these conventions may feel about the payment of this 25 cent charge. But before we interfere, this fact must be remembered, certainly carrying passengers for a cent and a half a mile is carrying them for a pretty low charge. This is a concession made by the railway companies to people travelling in large numbers. The railway companies have discretion in connection with reducing fares. The law does not give this Board any jurisdiction over railway companies to compel them to issue excursion rates. If this were an application to compel the railway companies to carry bodies of people of 300 or more at one-way fares, we would have no jurisdiction to compel the railway companies to put in any such tariffs.

Now in effect this is an application to compel the railway companies to take 25 cents off the tariff that they have filed. The tariff is a one-way fare plus 25 cents; and in effect the request is that the railway company be compelled to carry at a one-way fare and cut off the 25 cents. The law does not give us jurisdiction to do anything of the kind.

We have had applications from different sources, one in particular from Montreal a year or two ago, to compel the railway companies to issue excursion tickets to some ice festival or ice palace or something they were having down there. We had also one from Sherbrooke in connection with a snowshoe association. The railway companies came to the conclusion

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that issuing excursion fares for meetings of that kind was not in the interest of the country. It was advertising that the country was cold, that the people engaged in the luxuries of ice palaces and the like, and they did not think that was good for immigration purposes. They said, We will not issue return tickets or excursion fares to demonstrations of that sort. We were asked to intervene and we held that we had no jurisdiction to intervene.

Mr. Mabee.

A railway company issues tickets to 300 people or more and we are asked to say that 300 is too many, that it ought to be cut down to 250 or 200. The answer is that the statute does not give us any authority to do anything of the kind. The railway companies have the right, if they like, to apply the regular return trip fare to any number of persons travelling from the same place to the same place, or as these people do, to these gatherings.

The application we think must fail upon both heads; first with reference to the 25 cent charge; and second with reference to the contention that 300 is too many.

I think it would be advisable for the railway companies to revise this unfortunately worded clause and set forth more clearly what evidently the intention was when the tariff was filed.

Mr. McLean.

MR. COMMISSIONER MCLEAN (dissenting in part):—In regard to the tariff, I have indicated already the view I take in the matter. I differ slightly from what the Chief Commissioner has said. I cannot quite see that the tariff as worded falls within the definition of a toll contained in section 9 of chapter 61 of 7 and 8 Edw. VII. I think it is legitimate to assume that when the association saw fit, acting for the company, to put in the words "defray expenses," put in small capitals and in connection with the question of validation, they were indicating that that was a special expense of validation. I cannot see that that fits into what is covered by the scope of tolls.

Order refused.

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H. C. J. 1912

March 15.

Re GALBREAITH.

Ontario High Court, Middleton, J. March 15, 1912.

1. COURTS (§ II A 5—172)—CONSTRUCTION OF WILL—HYPOTHETICAL QUESTIONS.

It is against the policy of the Court to attempt to answer hypothetical questions based upon conditions which may never arise, and, therefore, the Court will not, either upon an originating notice under Ont. Con. Rule 938, or in an action, deal with questions as to the construction of a will relating to the devolution of the estate in events which have not yet happened.

ONT.

H. C. J.
1912

RE GALBREAITH.

Statement

MOTION by the executors of General Brock Galbreaith, deceased, under Con. Rule 938, for an order determining certain questions arising in the administration of his estate as to the construction of his will.

H. Carpenter, for the executors and for Frank (or Joseph Franklin) Galbreaith and his wife.

W. M. McClemont, for Jessie Elizabeth Townsend.

J. R. Meredith, for two infants.

Middleton, J.

MIDDLETON, J.:—Upon the argument, I pointed out to the counsel that most of the questions asked were questions which could not properly be propounded at this stage, either upon an originating notice or in an action, because the information sought related to the devolution of the estate in events which had not yet happened, and that it was against the policy of the Court to attempt to answer hypothetical questions based upon conditions which may never arise. To rule otherwise might give rise to idle litigation and the incurring of much useless expense, particularly if the decision gave rise to a series of appeals.

Finally, the parties agreed that the only question that could now be advantageously dealt with was the one relating to the legacy of $150; the question being whether the intention of the testator was to give one sum of $150 or to give an annuity of $150, and, if so, for how long.

As I read the will, the testator has given an annuity of $150, payable on the 1st day of October in each year after his death until the homestead property is sold; which I interpret to mean until an actual sale of the homestead property is made by the executors, if, by reason of Frank's death, the right in the executors to sell arises, or the expiry of fifteen years from the date of the will, when Frank himself, if then living, is entitled to sell. I think the fifteen years is the extreme limit; but if, by reason of Frank's death, the property is sold earlier, the right to the legacy then ends, and the annuitant will, instead thereof, receive the pecuniary legacy given in the earlier part of the will.

The costs of all parties may be paid out of the estate.

Order accordingly.

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June 29.

REX v. CANADIAN PACIFIC R. CO.

Alberta Supreme Court, Scott, Stuart, Beck, and Simmons, JJ. June 29 1912.

1. EVIDENCE (§ II J—305)—PRESUMPTION AS TO CONTENTS OF BOX—COURSE OF BUSINESS—DELIVERY TO CARRIERS—ABSENCE OF DIRECT EVIDENCE.

In the absence of direct evidence the contents of a box of military supplies was sufficiently shewn in an action by the Crown against a railway company for its loss, by the testimony of the officer in charge of the supplies, that he selected them from the general stores and turned them over to a person of excellent character, whose duty it was to box and ship them, and that the latter delivered a heavy box to the railway company, which receipted for it, and that such person could not be produced at the trial, as his term of enlistment had expired, and his whereabouts was unknown.

Statement

APPEAL by the Crown from the judgment of Harvey, C.J., presiding at the trial, whereby only nominal damages were awarded to the Crown for the loss of a box of militia supplies consigned from Calgary to Edmonton by an Ordnance officer.

The appeal was allowed and judgment directed to be entered for the value of the consignment, Simmons, J., dissenting.

Stanley Jones, for the Crown.

G. A. Walker, for the railway company.

Scott, J.

SCOTT, J.:—This is an action in which His Majesty seeks the return of a box of militia clothing and supplies alleged to have been delivered to the defendant company at Calgary on the 18th June, 1910, for carriage to Edmonton, or for payment of $845.85, the value thereof, and $2.65, the amount of the freight charges paid thereon. The learned Chief Justice, who tried the action, while satisfied that a box was delivered by the Ordnance officer at Calgary to the defendant company there on that date, and that it was lost in transit, gave judgment for His Majesty for nominal damages only, giving as his reason for so doing that the evidence did not disclose what the box contained.

Theodore Boulangeau, the Ordnance officer for the district comprising this province, who resides at Calgary, and whose duty it was to look after military properties and supply them to the local militia, states that he received instructions to ship certain supplies to Lieut.-Col. Edwards at Edmonton for the equipment of his regiment.

These supplies, which were enumerated by the witness, and which were valued by him at $485.85, were selected and counted out by him in the store-room, ready to be packed and shipped, by one Ryan, who was then in charge of the store-room, and whose duty it was to pack and ship them. The latter made out a requisition for their transport by the defendant company, and afterwards assisted in loading them on the dray for conveyance to the freight sheds.

The box was delivered to the defendant company on that day, and a clerk in their freight department gave a receipt for it, specifying it as "one box of clothing," its weight being specified therein as follows, "said to be 417." The freight charged thereon at that time was $2.65, which was at or about the usual rate of freight for a package weighing 417 pounds from Calgary to Edmonton. Ryan, whose duty it was to pack the box, had been in the employment of the Militia Department for eighteen or twenty years. He subsequently left the service, his term of service having expired, and afterwards left the province. Boulangeau states that he never had any complaints to make as to Ryan's capabilities, never heard of any shipment going to another person by mistake, and that the supplies he had been sending out (presumably excepting this particular shipment) had reached the proper persons. What is shewn to be the ordinary routine of the stores department, which is a department of the public service, the long and apparently faithful and efficient service of the storekeeper Ryan, the absence of anything tending to cast suspicion upon him, the fact that he had nothing to gain by omitting to perform his duty upon that occasion, and the further fact that the defendant company acknowledged the receipt of a box of clothing, afford, in my opinion, reasonably sufficient evidence to justify the Court or a jury in assuming that the supplies referred to were packed by him in the box, and that they were therein at the time it was delivered to the defendant company.

I am, therefore, of the opinion that the appeal should be allowed with costs and judgment entered for the plaintiff in the Court below for $488.50 with costs.

STUART, J.:—This is not a case, as it appears to me, in which any law is involved at all. It is a pure question of inference of fact, where such inference is sought to be drawn from undisputed facts. Stuart, J.

In such cases we have as much right as the trial Judge to draw what inference we please from the undisputed facts. Sitting here, then, as a judge of fact, I have only to say that I feel quite able to make the inference that the goods were placed in the box. They were put out all ready to be packed. Instructions were given to a man, shewn to have been for many years in the service and of excellent character, to put them in the box, and it was shewn to be his duty so to do. Then the box, with a weight of 417 lbs., was delivered to the defendants. There must have been something of very considerable weight in the box. I conclude that it was the goods in question; and I think the appeal should be allowed with costs, the judgment below set aside, and judgment entered for the plaintiff for $488.50 and costs of the action.

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Beck, J.

BECK, J.:—This is an action to recover against both defendants as common carriers damages for loss of a box of military clothing, etc., alleged to have been delivered to them for carriage. The case was tried by the learned Chief Justice without a jury.

At the conclusion of the plaintiff's case, the trial Judge dismissed the action as against the Pacific Cartage Company with costs, on the ground that the evidence satisfied him that the box, though received by the cartage company, had by that company been delivered, in pursuance of their obligation, to the Canadian Pacific Railway Company. There is no appeal from that portion of the judgment. The learned Judge, however, though finding that the Canadian Pacific Railway Company had actually received the box and had failed to deliver it, awarded the plaintiff damages against the Canadian Pacific Railway Company only to the amount of $1, and that without costs, because he was of opinion that there was no evidence to prove that goods of any value were contained in the box.

Against this decision and the amount of damages the plaintiff appeals.

Captain Boulanger was the Ordnance officer for military district No. 13, comprising the whole of the province of Alberta. The office and stores of which he had charge were at Calgary. He went about making a shipment to Lieut.-Col. Edwards, the officer commanding the district, who resided at Edmonton, of the following goods: 193 mess-tin covers, 286 haversacks, 6 waistbelts, 6 sword-knots, 28 serge frocks, 14 pantaloons.

The making of this shipment was in the ordinary course of his duties, which were, he says, "looking after the military properties, receiving them from headquarters (Ottawa) and contractors, and giving them to the local militia commanded by the officer commanding the district."

He says that he furnishes all the military supplies for the militia in Alberta; that how he came to make this particular shipment was, that it was to be made to the officer commanding the district in the ordinary way to equip the 101st Regiment at Edmonton; that, as soon as the articles in question were received from Ottawa, they were packed in cases and shipped. The effect of the evidence as to his personal knowledge of the goods being packed and shipped is this: that he counted out the several articles in the room at the stores for the purpose of their being shipped, and that he left them lying on the floor ready to be packed; that it was then the duty of one Ryan, an official who then had charge of the stores, to pack them in a box. Ryan, who had been a faithful official of the Department for nearly twenty years, had left the service some time before the action was commenced, his term of service having expired, and his evidence was not procured. Then Captain Boulanger, in accordance with the established routine of his

office, issued a transport requisition signed by himself. This requisition, under the heading "Pkgs.," had the figure "1"; under the heading "Stores & Clothing," the words "box clothing"; under the heading "weight lbs.," the figures "417."

It was Ryan's duty to weigh the box containing these articles, to mark the weight on the box, and to report the weight to Captain Boulanger, who, no doubt, got the weight of this particular box in due course from Ryan before issuing the transport requisition.

Ryan's next duty was to deliver the box to the Pacific Cartage Company for delivery to the Canadian Pacific Railway Company. It was the duty of one Ireland, a non-commissioned officer under Captain Boulanger, to accompany the box to the Canadian Pacific Railway freight shed, and to issue a shipping bill in triplicate for shipment of the box via the Canadian Pacific Railway to Edmonton.

A shipping bill covering the box, and signed by Ireland, is produced, as well as a similar one signed by the agent at Calgary of the Canadian Pacific Railway Company. The freight charges of the Canadian Pacific Railway Company for delivery of the box at Edmonton were estimated on a weight of 417 lbs., and paid through Captain Boulanger's office.

On this and some additional evidence, the learned Chief Justice held that the Pacific Cartage Company had discharged their duty by delivering the box to the Canadian Pacific Railway Company, and that the latter company were responsible for the non-delivery of the box. This particular box was the only box shipped from Captain Boulanger's office on the day the transport requisition and the shipping bills bear date. It is quite clear, to my mind, with much deference to the learned Chief Justice, that he ought to have found the Canadian Pacific Railway Company liable, not merely for the loss of the box, but of its alleged contents also.

In Phipson on Evidence, 4th ed., p. 87, it is laid down that to prove that an act has been done, it is admissible to prove any general course of business or office, whether public or private, according to which it would ordinarily have been done; there being a probability that the general course will be followed in the particular case. Similar propositions are to be found in the other standard books on evidence. The usual instances of the application of this general rule are those of the posting or delivery of letters. Phipson has the following example (p. 103):

> To prove the posting of a letter it is relevant to shew . . . that the letter was put in a given place, where all letters were regularly put for posting, whence they were always carried to the post by a servant: *Hetherington* v. *Kemp*, 4 Camp. 193; *Skilbeck* v. *Garbett*, 7 Q.B. 846; *Percy Supper Club* v. *Whyte*, 106 L.T.J. 308. In the first-mentioned case, it was held that the servant must be called, but in the others this was decided not to be necessary. In the last-mentioned

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case Channell, J., remarked that fifty years ago such proof, *i.e.*, without calling the servant, would have been wholly insufficient.

The last-cited case is not accessible to me, but as cited it appears to my judgment as supporting my opinion that, in the present case, it was not necessary to call Ryan, who was shewn to be a faithful servant and whose duty it was to have packed the various articles in question in the box, and who, if he failed to do so, cannot be supposed merely to have made a mistake, but must be supposed—contrary to a presumption which we ought to make—to have fraudulently and criminally substituted in the box some worthless material of approximately the same weight (as we are, by the use of our ordinary knowledge, able to estimate), and to have stolen the articles which he ought to have put in the box—articles, too, adapted only for special use.

On the general principle, therefore, that proof of a regular system of business is *primâ facie* proof that in a particular case the general system has been followed, I think there was sufficient evidence that the goods in question were packed in the box delivered to the Canadian Pacific Railway Company; and it seems to me that this evidence is entitled to additional weight in the present case, inasmuch as, it being established that the box came to the hands of the Canadian Pacific Railway Company, and was lost through their negligence, there is a presumption of fact that the articles contained in the box were not worthless, but of the value of such goods as might reasonably be supposed to be in it. This is, perhaps, the application in a mild form of the principle of the maxim, "*Omnia præsumuntur contra spoliatorem.*"

I should be prepared to go to this extent. Take as an example a large departmental store, with which some customers make a cash deposit, against which their orders are charged. Then suppose it were shewn that the regular custom in the departmental store was, that a clerk should take the customer's order, note it in a counter-check book, select the goods, note the prices to be charged, deliver a duplicate to the customer, then lay aside the goods in a special place to be wrapped up by another clerk, whose duty, after wrapping them up, was to address the parcel and deposit it in a large basket, from which it was the duty of another clerk to take all the parcels and distribute them to the proper delivery vans in charge of others, whose duty it was to deliver the parcels received to the addressees. With this system proved and the fulfilment of the duty of the first clerk only proved, then, if a particular customer was shewn on a particular day to have given but one order for certain goods, and on the same day to have received one parcel and only one from the store, and he gave no account of its contents, I should hold that he had *primâ facie* been properly charged with the amount of the order.

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Simmons, J.

I see no difference in principle between such a case as that which I have suggested by way of illustration and the present. Though "fifty years ago" it might have been thought extravagant, it seems to me to be a proper and reasonable application to modern methods of an acknowledged principle.

I would, therefore, for the reasons which I have tried to explain, allow the appeal with costs, and direct judgment to be entered for the sum of $488.20, with interest at 5 per cent. from the commencement of the action, with costs.

SIMMONS, J. (dissenting):—This is an action by the Crown against the Canadian Pacific Railway Company for the value of a box of military supplies delivered to the defendants at Calgary for shipment to Edmonton.

The Chief Justice, before whom the action was tried without a jury, found negligence against the defendants as common carriers, but also found that the plaintiff had not furnished proof of the contents of the box; and, therefore, assessed the damages at $1; and from this judgment the plaintiff appeals.

Theodore Boulangeau, Ordnance officer at Calgary, gave evidence to the effect that his duties were to look after the military properties, receive them from headquarters, and give them out to the local militia, and that Mr. Ryan was conducting the stores at the time. Mr. Boulangeau did not see the packing of the supplies in the box, as this was done by Mr. Ryan, who has since left the service, and is not now in the province. Mr. Boulangeau made out a requisition containing a description of the goods which were to be shipped. He did not see the goods packed, but saw them lying on the floor, and his personal knowledge of the contents of the shipment ended there.

It is contended by the appellant that there is a presumption of fact that Mr. Ryan, who was a public officer, would, in the ordinary course of his duty, do what his superior officer, Mr. Boulangeau, requested him to do, and a further presumption that he was honest, and was not a party to any fraud in the matter of packing the box.

It is contended that these are presumptions which furnish an exception to the general rule that the best evidence of which the case in its nature is susceptible should always be produced. These presumptions are apparently in the same class as those in which secondary evidence is admitted as to declarations in discharge of duty in the ordinary course of business or professional employment.

Taylor on Evidence, 9th ed., ch. 7, gives a very complete and able discussion of the application of this principle. At p. 455 the author says:—

> Of late years great disinclination has been evinced by the Courts in extending the principle of allowing entries which have been made in ordinary course of business to be admitted as evidence, further than the decisions have already carried it.

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Simmons, J.

The case before us is one in which the extension of the principle of assuming that any one, whether a public officer or not, performed the duties of his office, would impose a hardship upon the defendants. A carrier has no opportunity of ascertaining the kind or the value of a box or parcel which has been lost. This is a class of evidence which is peculiarly within the sole control and knowledge of the opposite party; and, when damages are claimed by him, he should surely be under an obligation to produce the best class of evidence available to him. The plaintiff in this action made no attempt to get the evidence of Ryan, who alone could give positive evidence that the goods were actually placed in the box. There is no suggestion that the plaintiff made any attempt to get his evidence, nor is there any suggestion that it was inconvenient to obtain it, beyond the fact that Ryan was in a neighbouring province.

Rule 118 of the Judicature Ordinance provides:—

> It shall not be sufficient for a defendant in his statement of defence to deny generally the grounds alleged by the plaintiff's statement of claim, or for the plaintiff in his reply to deny generally the grounds alleged in a defence by way of counterclaim, but each party must deal specifically with each allegation of fact, of which he does not admit the truth, except damages.

It is then a question as to the shifting of the onus of proof. The plaintiff has established a *primâ facie* case as to negligence against the defendants upon proof of delivery of the box to them and their acceptance of the same for carriage to Edmonton. When the plaintiff seeks to establish the amount of damages, the evidence of this is peculiarly within his control and knowledge and cannot be met in any way by the defendants, further than by cross-examination of the plaintiff's witnesses. It seems to me that the case is one of a class in which the plaintiff should produce the best evidence reasonably available before the onus is shifted to the opposite party; and I would dismiss the appeal with costs.

Appeal allowed; SIMMONS, J., *dissenting.*

QUE.

S. C.
1912

May 28.

LEHR v. PETERSON.

Quebec Superior Court, Charbonneau, J. May 28, 1912.

1. OATH (§ I—1)—AUTHORITY OF A NEW YORK NOTARY PUBLIC TO TAKE OATH UPON COMMISSION—C.P. QUEBEC, ART. 30.

A notary public of the State of New York may, under article 30 C.P., administer oaths to depositions taken under a *commission rogatoire* for use in the Province of Quebec.

[*Shwob* v. *Baker*, 5 Que. P.R. 441, followed.]

Statement

MOTION by defendant to reject the *commission rogatoire* on the ground that the commissioner appointed appeared to have been sworn before a notary public in New York county, and

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that the said public notary is not a competent officer to administer the oath for depositions to be used in the province of Quebec.

The motion was dismissed.

Casgrain, Mitchell, McDougall & Creelman, for plaintiff.
Heneker & Johnson, for defendant.

MONTREAL, May 28, 1912.

Charbonneau, J.

CHARBONNEAU, J.:—Oaths may be received before any public notary under his hand and official seal, and that, therefore, the procedure followed by the commissioner in this case is regular; I dismiss the motion with costs. In this judgment I follow the doctrine laid down in the case of *Shwob* v. *Baker*, 5 Que. Practice Reports, p. 441, which seems to be more in line with the literal interpretation of article 30 C.P. than the judgment of *Amero* v. *Gifford*, 9 Que. Practice Reports, p. 16, or *Dillon* v. *Knowlton*, 2 Que. Practice Reports 335, or *Laurendeau* v. *Montlord*, 7 Que. Practice Reports, p. 37. The semicolon which separates the part of the article referring to a notary public from the part of the article referring to affidavits taken in England forbids any interpretation limiting the authorization to administer the oath to a public notary of England only.

Motion dismissed.

TRAPP & CO. v. PRESCOTT.

B.C.

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1912

June 4.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin and Galliher, JJ.A. June 4, 1912.

1. CHEQUES (§ II—12)—EXCUSE FOR FAILURE TO PRESENT—NOTICE FROM DRAWER TO PAYEE—STOPPING OF PAYMENT.

A drawer of a cheque, who notifies the payee that he has stopped payment thereof, thereby waives presentation for payment.

[*Hill* v. *Heap*, D. & R.N.P. 57, distinguished.]

2. SALE (§ II A—27)—SALE BY AUCTIONEER FOR UNNAMED PRINCIPAL—IMPLIED WARRANTY.

An auctioneer who sells goods, not as principal, but as auctioneer only, though not naming his principal then present and in possession of the goods, does not, without more, warrant the title to the goods sold; he does no more than engage that he is in fact instructed and authorized by his principal to sell.

[*Wood* v. *Baxter*, 49 L.T.N.S. 45, followed; compare *Johnston* v. *Henderson*, 28 Ont. R. 25; *Cochrane* v. *Rymill*, 40 L.T.N.S. 744, 27 W.R. 776; *Barker* v. *Furlong*, [1891] 2 Ch. 172, and *Consolidated Co.* v. *Curtis*, [1892] 1 Q.B. 495.]

Statement

ON appeal by the defendant from the judgment of Grant, Co. Ct.J. in favour of the plaintiffs, a firm of auctioneers, for the amount of a cheque given them by the defendant in payment for a team of horses purchased by the defendant at an auction sale. The defendant had stopped payment of the cheque sued upon

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as the horses had been claimed by another party under a lien note. The sale took place in the market building and from the evidence the trial Judge found that the defendant knew the sale was being conducted on behalf of two Japanese who were present; that the auctioneer, without mentioning any names, stated the horses belonged to some Japs, who were in the shingle bolt business and were selling out; that the sale was for cash, and that the auctioneers at his request advanced the defendant the purchase price, and took his cheque for the same.

The appeal was dismissed, Irving, J.A., dissenting.

A. M. Harper, for appellant.

D. A. McDonald, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I think the appeal should be dismissed; I concur with the trial Judge.

Irving, J.A.

IRVING, J.A. (dissenting):—The auction sale took place in the market building and an actual possession of the horses was given to the auctioneer, who did not disclose the names of the vendors. He did say, however, that the horses were the property of some Japs who were in the shingle bolt business, and were selling out. That, in my opinion, does not constitute a disclosure of the principal so as to exempt the auctioneer from liability. In *Mainprice* v. *Westley* (1865), 6 B. & S. 420, 34 L.J.Q.B. 229, there was a suggestion (but dissented from by Blackburn, J.) that an auctioneer may escape personal liability by contracting merely as agent without disclosing the vendor's name, but in *Woolfe* v. *Horne* (1877), 2 Q.B.D. 355, it was held that as the auctioneers had the actual possession of the goods, they must be regarded as the persons who made the contract, and could, therefore, be sued personally for the non-delivery, notwithstanding the name of the principal had been disclosed to the buyer at the time of the sale.

The learned County Court Judge at p. 65 says the plaintiff certainly brought to the knowledge of the defendant the fact that certain designated Japs who were present and discussed the terms of sale as cash, were the persons who were selling the horses.

It is true the Japs were designated, but as I have mentioned in the general way, whether they were present or not, was not made known to the defendant. "I did not know whether the Jap was the hostler or the owner, or what"; and the discussion of the terms of sale took place wholly between the plaintiff and his clients. I cannot reach the conclusion of fact that the principal was present to the defendant's knowledge, or that he, in answer to the defendant's request, fixed the terms, as cash, to the defendant's knowledge.

In *Hanson* v. *Roberdeau* (1792), 1 Peake's N.P.C. 163, Lord Kenyon said:—

Where an auctioneer names his principal, it is not proper that he should be liable to an action, yet it is a very different case when the auctioneer sells the commodity without saying on whose behalf he sells it. In such a case the purchaser is entitled to look to him personally for the completion of the contract.

There are many authorities which shew that auctioneers may recover compensation from their principals. Why is that the rule? Because there was in this case a contract between the plaintiffs and the Japanese: *Adamson* v. *Jarvis* (1827), 4 Bing. 66; but as the plaintiffs withheld the name of the Japanese from the defendant, it is impossible for the defendants to institute an action against the Japanese.

The learned County Court Judge thought the auctioneers were a mere conduit pipe as described by Bramwell, L.J., in *Cochrane* v. *Rymill*, 40 L.T.N.S. 744. The essence of the case put by Bramwell, L.J., was that the possession remained in the principal, and the auctioneer merely introduced the purchaser to a vendor.

How different is this case. Trapp brought up the horses to auction; he sold them, and after they were knocked down he said to the Japanese in whose charge they were: "Put them over there;" and there they remained until the defendant gave his cheque. After that he, with Trapp's permission, took them away.

I would allow the appeal.

MARTIN, J.A.:—As to the first objection, that the cheque was not presented for payment, I am of the opinion that the action of the defendant (the drawer) in notifying the payees that he had stopped payment of the cheque, constituted a waiver under sec. 92 (*c*) of that formality. At first sight it might appear that the case of *Hill* v. *Heap* (1823), D. & R.N.P. 57 (which is also inaccurately and insufficiently reported in 25 Rev. Rep. 791) was an authority to the contrary, but it is distinguishable because in that case the direction to stop payment had not been "communicated" by the drawer to the payee, but voluntarily by the drawees. In the case at bar it was not the drawees (the Canadian Bank of Commerce), but the drawer himself who gave the direct notification, and in that lies the distinction, because it does not appear by the report that it was any part of the drawee's duty in the *Hill* v. *Heap*, D. & R.N.P. 57, case to communicate the drawer's orders to them to the payees, and therefore the payees had no right to rely upon their voluntary statement, as they were not the drawer's agents for the purpose of making it, and so the payees were not discharged from the obligation of presentment, because as Lord Ellenborough said in *Prideaux* v. *Collier* (1817), 2 Stark. 57, "it was possible that (he) might change (his) mind" and withdraw his countermand of payment, a thing he could not be expected to do after he had directly noti-

Martin, J.A.

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fied the payees of his countermand, and they were entitled to act in the assumption that he would not change his mind unless he notified them of his intention to do so.

Second, on the facts I have no doubt that it was quite open to the learned trial Judge to reach the conclusion that he did on pp. 67 and 68 of the appeal book, that the sale was for cash, and the auctioneer advanced the purchase price to the defendant, who knew the auctioneer was selling on behalf of two Japanese then present in possession of the horses, though no names were given; and in view of that finding the case is brought within the principle of *Wood* v. *Baxter* (1883), 49 L.T.N.S. 45, wherein the Queen's Bench Division held that (p. 47):—

> An auctioneer who sells goods, not as owner, but as auctioneer only, though not naming his principal, does not, without more, warrant the title to the goods sold; he does no more than engage that he is in fact instructed and authorized by his principal to sell.

With respect to the motion for a nonsuit, all I have to say is that if I am right in my view as to the presentment of the cheque, then the learned Judge was right in refusing it.

The appeal should be dismissed.

Galliher, J.A.

GALLIHER, J.A.:—I agree with MARTIN, J.A.

Appeal dismissed, IRVING, J.A., *dissenting*.

ONT.
H. C. J.
1912
May 23.

DILTS v. WARDEN.

Ontario High Court, Sutherland, J. May 23, 1912.

1. MARRIAGE (§ IV B—59)—ANNULMENT—PRIOR EXISTING MARRIAGE—DECREE ASKED BY CONSENT WITHOUT ORAL TESTIMONY.

A marriage will not be held invalid upon an agreement between the parties filed in the action that the pretended marriage between them should be adjudged and declared a nullity on the grounds set forth in the plaintiff's statement of claim, that she was induced to go through a marriage ceremony with the defendant on the false representations that he had obtained a divorce from a woman to whom he had been formerly married.

[*Lawless* v. *Chamberlain*, 18 O.R. 296, specially referred to.]

Statement

IN this action the plaintiff asked for a judgment or order declaring that the defendant was not her lawful husband, and for an injunction against his interfering with her, and for other relief in connection with the custody and control of their children.

The motion was refused.

W. D. Swayzie, for plaintiff.

H. Carpenter, for defendant.

Sutherland, J.

SUTHERLAND, J.:—In her statement of claim the plaintiff alleges that, relying on the defendant's representation that he had obtained a divorce from a woman to whom he had been

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previously married, she went through a marriage ceremony with him on or about the 26th October, 1896, and that subsequently they lived together and cohabited. There are four children. She alleges further that she has learned that the defendant was not divorced before his marriage to her. In his statement of defence the defendant alleges that he did obtain such divorce.

At the trial, a paper writing indorsed "Minutes of Judgment" was filed, in which it is stated that the parties to the action have agreed that their "pretended marriage" should be "adjudged and declared a nullity upon the grounds set out in the plaintiff's statement of claim." There are other terms as to the custody of and access to the children and as to further interference with the plaintiff by the defendant; and the latter also agreed therein to pay the costs of the action, fixed at $75. This writing purports to be signed by the parties to the action and to be witnessed by their respective solicitors.

No oral testimony was offered at the trial. In these circumstances, counsel appeared and stated that he had been instructed by the solicitors for both parties to do so and ask for judgment in terms of the said agreement.

Without expressing an opinion as to what relief, if any, could be given in this Court in a case such as this, if formal proof were given by evidence under oath that the defendant had gone through a form of marriage with the plaintiff while still the lawful husband of another woman then living, I am of opinion that I should not in any event be asked on the material before me to make any such order as is desired. In the written consent or agreement there is not even an acknowledgment on the part of the defendant of the truthfulness of the allegations of the plaintiff.

In *Lawless* v. *Chamberlain*, 18 O.R. 296, at p. 300, the Chancellor points out the care to be taken in matters of this kind, as follows:

> Mr. Justice Butt also alludes to the great care and circumspection which should be exercised in dealing with questions affecting the validity of marriage. This is emphatically so as regards the character and quality of the evidence. The rule has long been recognized in cases of annulling marriage that nothing short of the most clear and convincing testimony will justify the interposition of the Court.

This principle is recognised in the Ontario statute of 1907, 7 Edw. VII. ch. 23, sec. 8, as amended by 9 Edw. VII. ch. 62, and in connection with the restricted jurisdiction thereby conferred.

I quote from the latter statute:—

> 1. Section 31 of the Marriage Act as enacted by the Statute Law Amendment Act, 1907, is hereby amended by adding thereto the following sub-sections:—

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Sutherland, J.

(6) No declaration or adjudication that a valid marriage was not effected or entered into shall be made or pronounced under the authority of this section upon consent of parties, admissions, or in default of appearance or of pleading or otherwise than after a trial.

(7) At every such trial the evidence shall be taken *viva voce* in open Court, but nothing in this sub-section shall prevent the use of the depositions of witnesses residing out of Ontario or of witnesses examined *de bene esse*, where, according to practice of the Court, such depositions may be read in evidence.

I, therefore, decline to ratify the consent or agreement in question, or to make a declaration as asked.

I do not think, in the circumstances, that I can make any order as to costs.

Motion denied.

ONT.

H. C. J.
1912

June 18.

PHILLIPS v. CONGER LUMBER CO.

Ontario High Court. Trial before Latchford, J. June 18, 1912.

1. TRESPASS (§ I C—17)—DEFENCE OF NON-COMPLIANCE WITH MINING ACT.

It is not a defence to an action for trespass upon land held by the plaintiff under a mining lease from the Crown, to shew that not enough mining work had been done thereon by the plaintiff to comply with the requirements of the Mining Act, since that was a matter exclusively between the lessee and the Crown.

2. TRESPASS (§ II B—10)—MAINTENANCE OF ACTION FOR, BY LESSEE OF MINING LANDS—R.S.O. 1897, CH. 36, SEC. 40.

A lessee of land from the Crown under a mining lease, who was, under R.S.O. 1897, ch. 36, sec. 40, entitled to such trees, other than pine, as are required for building, fencing, or for any other purposes necessary for the working of the mine, or the clearing of the land, may maintain an action of trespass against one who cut and removed timber therefrom.

[Compare *Brown* v. *Motherlode*, 2 D.L.R. 277, and *National Trust* v. *Miller*, 3 D.L.R. 69.]

3. STATUTES (§ III—134)—EFFECT OF REPEAL ON EXISTING RIGHTS—RESERVATIONS EXPRESS OR IMPLIED.

The rights of a lessee to cut timber acquired under a lease from the Crown, pursuant to R.S.O. 1897, ch. 36, sec. 40, are not affected by the repeal of the said Act in 1906, 6 Edw. VII. ch. 11, sec. 222, as the latter statute provided that such repeal should not affect any rights acquired or any act or thing done under the repealed statute, nor are such rights affected by the terms of the later Act, the Mines Act, 1908, 8 Edw. VII. ch. 21.

[*Gordon* v. *Moose Mountain Mining Co.* (1910), 22 O.L.R. 373, followed.]

4. TRESPASS (§ I A—5)—WHAT CONSTITUTES—PURCHASER OF TIMBER WITHOUT KNOWLEDGE THAT IT WAS REMOVED BY A TRESPASSER.

The buyer of a quantity of logs which were the proceeds of timber cut and removed by the seller in acts of trespass and encroachment upon the property of an adjoining owner, is not liable in damages for the acts of trespass, in addition to and apart from his liability for the value of the logs in conversion, unless he knew of the trespass.

5. TROVER (§ I B—10)—WHAT CONSTITUTES CONVERSION—TAKING POSSESSION OF TIMBER PURCHASED FROM A TRESPASSER AFTER CLAIM MADE BY OWNER.

One who took possession of the logs after notice of the claim of the true owner of the timber, from which they were cut is liable to the latter for conversion although he had in good faith bought the logs from the trespasser who had cut down the timber.

[*Greer* v. *Faulkner* (1908), 40 Can. S.C.R. 399, referred to.]

ACTION for damages for trespass and wrongful cutting of timber on the plaintiff's land.

Statement

Judgment was given for plaintiff.

H. H. Dewart, K.C., and *J. P. Weeks*, for the plaintiff.

F. R. Powell, K.C., for the defendant Watts.

D. L. McCarthy, K.C., for the defendants the Conger Lumber Company.

Latchford, J.

LATCHFORD, J.:—Under a demise from the Crown, dated the 14th October, 1904, and duly registered under the Land Titles Act, the plaintiff is the holder of a mining lease, for a term of ten years, of the south halves of lots 32 and 33 in the 7th concession of the township of Foley. The defendant Watts had, it appeared, previously applied to the Crown Lands Department to be located for the lots; but, before the lease to the plaintiff issued, released to the plaintiff his claim for damages to the surface rights; and, some time in 1904—the document bears no date—transferred to the plaintiff all his right, title, and interest in the south halves of the lots mentioned. Watts sought upon the trial to impeach the latter document, but I declined to allow him to do so. He had not given any intimation that he intended the attack, and his manner in giving his testimony led me to place little reliance on any of his unsupported statements.

Some prospecting was done upon the property, and a shaft sunk on an adjoining lot to the south. It was contended that the work done was not a sufficient compliance with the requirements of the Mining Act. This, however, is a matter between the Crown and the lessee; and in any case there was in this regard, according to credible evidence, a sufficient compliance with the statute.

But little mining was done during the years 1909 and 1910. The property was unoccupied; the owner lived at a distance—Watts near by; settlement in the neighbourhood was sparse; hemlock and other trees now of value stood near the invisible line between the mining claim and the lands of Watts to the south of it: all circumstances ideally favourable for the trespass which, I find, the defendant Watts was tempted to commit. He yielded to the temptation without, I think, much resistance, and with full knowledge that he was sinning against

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the absent owner, who, as lessee of the mining rights, was entitled, under the statute in force when the lease was made (R.S.O. 1897 ch. 36, sec. 40), to such trees other than pine as were necessary for building, fencing, or fuel, or any other purpose necessary for the working of the mine or the clearing of the land. The legislation subsequently enacted did not affect the lessee's rights to the timber: *Gordon* v. *Moose Mountain Mining Co.* (1910), 22 O.L.R. 373.

It is, upon the evidence, difficult to determine the exact amount of the damages resulting from the trespass. I do not think I can give full effect to the testimony of Labreche and Gardiner. I do not question their honesty or competency. They counted and measured the pieces left in the woods; and, as to such, I accept the quantities which are given. The logs, timber, and bark taken away they could estimate only from the stumps and tops which they found to have been cut in 1909-10 and 1910-11. That their estimate is a little high is apparent from the actual quantity of tanbark. According to the estimate there should have been about 110 cords of bark. No bark was peeled except in the last season. Of this, seven cords remain in the woods. Watts sold and delivered 68 cords. His total cut was, therefore, 75 cords, not 110; or, allowing for some slight loss in handling, about thirty per cent. less than the quantity estimated by the plaintiff's witnesses.

If the remaining figures of their estimate of what was taken away are similarly reduced, their 112,446 feet of hemlock becomes, approximately, 85,000 feet, and their 2,493 feet of oak, elm, and basswood, 1,650 feet.

The hemlock timber cut but not removed—probably because culled—they measured and found to be 9,377 feet.

On this basis, which seems to me as nearly an accurate estimate as can be made, the trespass of Watts in the two years, at the values stated by the culler Gardiner and the experienced lumberman Labreche—which I accept as proper values—works out as follows:—

75 cords tanbark, at $3	$225.00
94,800 feet hemlock, at $4	379.20
2,500 feet hardwood, at $8	20.00
	$624.20

Exact figures are afforded by the records of the Conger Lumber Company of the total quantity made for them by Watts—marked and delivered. However, only part of this was cut in trespass. Disregarding the pine (the right to which was in others), the total cut of Watts for his co-defendants, according to their books, was:—

	1909-10	1910-11	Total.
Hemlock, feet	33,523	120,500	154,023
Oak, etc., feet	1,921	917	2,838

Some portion of this was cut on Watts' land to the north; how much does not clearly appear. Hurd "thought" that about half the cut of 1910-11 was made south of the line. His estimate was, however, given without any pretence of accuracy.

Watts is responsible for the mixing of the timber cut north of the line with that cut to the south, and cannot reasonably object if the actual measurements and the estimates of Labreche and Gardiner, supported to no slight extent by the actual quantity delivered, are taken—subject to the deduction mentioned—as approximately stating the amount of the trespass.

As against Watts there will be judgment for $624.20 and costs.

His co-defendants had no knowledge of the trespass of 1909-10 when they purchased the timber which he had made in that season. But in April, 1911, before they had taken possession of the logs cut by Watts in 1910-11, they were notified of the trespass and that the plaintiff claimed the logs. They, nevertheless, took possession of the logs, and thus converted them to their own use. They are not liable for Watts's trespass, of which up to that time they were ignorant. But they then became liable for the conversion. The measure of damages against them is the value of what was cut in trespass as of the date of the conversion: see *Greer* v. *Faulkner* (1908), 40 Can. S.C.R. 399.

This may, in the absence of other evidence, be taken to be determinable by the prices paid to Watts, $6.50 for bark, $8.50 for hemlock, and $11.00 for oak, etc. At least half the logs converted by the Conger Company in 1911 were cut in trespass by Watts; or, 60,250 feet of hemlock and 458 feet of oak, etc. Taking the values and quantities stated, the liability of the Conger Company to the plaintiff is as follows:—

68 cords bark, at $6.50	$442.00
60,250 feet hemlock, at $8.50	512.00
458 feet oak, etc., at $11.00	5.00
	$959.00

There will be judgment against the Conger Lumber Company for $959 with costs.

Any sum realised against one of the parties is to be applied upon the judgment against the other.

All amendments may be made in the pleadings considered requisite or necessary to change the frame of the action as against the Conger Lumber Company from trespass to conversion.

Stay of thirty days.

Judgment for plaintiff.

ONT.

H. C. J.
1912
June 11.

Re THORNTON.

Ontario High Court, Middleton, J. June 11, 1912.

1. WILLS (§ III E—109)—RESIDUARY DEVISE WITH PARTICULAR DESCRIPTION.

Lands acquired by a testator after the date of his will pass to the residuary legatees under a devise to his nephew and niece of all his residuary estate following which devise in the will is a particular description of the real estate, notwithstanding that the parcel particularly described was subsequently sold and other lands purchased.

Statement

MOTION by Letitia Robbins, one of the next of kin of W. H. Thornton, deceased, for an order determining a question arising upon the construction of the will of the deceased.

J. C. Payne, for the applicant.

N. B. Gash, K.C., for the executors and residuary devisees.

Middleton, J.

MIDDLETON, J.:—This appears to me to be a particularly plain case. The testator gives his nephew and niece all his residuary estate, and then adds "my real estate is" etc. This parcel of land was sold and other land purchased.

The description given of the land owned at the date of the will does not in any way cut down the wide operation given to the general words used in the residuary devise; and clearly the after-acquired land passed. So declare. The applicant will have no costs. The executors and residuary devisees may have theirs out of the estate.

Order accordingly.

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SIBBITT v. CARSON.

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H. C. J.

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June 24.

Ontario High Court. Trial before Middleton, J. June 24, 1912.

1. BROKERS (§ II B—12)—REAL ESTATE AGENT—SUFFICIENCY OF SERVICES —SALE AFTER EXPIRATION OF EXTENDED OPTION.

A real estate broker exclusively employed for a specified time is not entitled to any commission upon a sale by his principal after the expiration of the agency to two persons, of whom one (the other having had no negotiations with the agent) verbally agreed to take some interest in a syndicate to be formed to purchase the property and in a subsequent dispute between himself and the agent as to the amount of such interest finally withdrew from the agreement and declined to have anything whatever to do with the agent and immediately put himself into communication with the principal for the purpose of buying the property.

[*Barchell* v. *Gowrie and Blockhouse Collieries, Ltd.*, [1910] A.C. 614; *Stratton* v. *Vachon*, 44 Can. S.C.R. 395; and *Rice* v. *Galbraith*, 2 D.L.R. 859, 26 O.L.R. 43, distinguished. See also *Singer* v. *Russell*, 1 D.L.R. 646, and annotation to *Haffner* v. *Grundy*, 4 D.L.R. 531.]

Statement

ACTION by a real estate agent to recover commission on the sale of land, tried without a jury, at Ottawa, on the 17th June, 1912.

The action was dismissed with costs.

R. G. Code, K.C., for the plaintiff.

G. F. Henderson, K.C., for the defendants.

Middleton, J.

MIDDLETON, J.:—The defendants Carson and Bingham owned land on Albert street. On the 23rd February, Bingham had some conversation with Sibbitt in his office as to the terms on which he would undertake the sale of the property. Nothing was concluded then. On the next day, Saturday the 24th, after consulting with his partner, Bingham again called, and placed the property with the plaintiff at $50,000, upon what was called in the evidence an exclusive agency or option, which was limited in time and would expire on the Monday at two o'clock. This time was undoubtedly very short; but, owing to some excitement with reference to real estate in this particular locality, and to the fact that some properties in the immediate vicinity had changed hands several times, each time at an increased price, and owing to the extremely optimistic disposition of the plaintiff, he assented to take the property upon these terms; and forthwith endeavoured to find purchasers or to arrange a syndicate to take over the property.

An option or agency of longer duration was sought. A document giving an option until the 29th was prepared and presented for signature; but the signature was promptly and emphatically refused.

Just before the expiry of the time-limit, the plaintiff communicated with the defendants, and was given until 2 p.m. next day to complete his arrangements. In the meantime, the plaintiff had made some endeavour to find purchasers, and had

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failed. Various suggestions as to exchange were refused by the defendants.

During the search for a purchaser, the plaintiff spoke to Mr. Grant, and obtained from him a verbal agreement to take some interest in a syndicate to be formed. Grant had heard of the property when offered for sale some time earlier than this, at a smaller price, and was willing to take some share, if acceptable co-adventurers could be found. A dispute ultimately arose between the plaintiff and Grant as to the amount of his contribution; and this ended by Grant withdrawing and declining to have anything further to do with the plaintiff. The plaintiff then made an endeavour to find some one who would take Grant's place in the proposed syndicate; but, as already stated, his efforts proved abortive.

In the meantime Grant, having had his attention thus drawn to the property, placed himself in direct communication with the defendants. This was after the expiry of the original option at two o'clock on Monday, but before the extension until two o'clock on Tuesday was up. Nothing further was done. The defendants communicated with the plaintiff at the expiry of the time limited, and he admitted his inability to find a purchaser. Subsequently, the defendants sold the land, for the stipulated price, to Grant and another co-adventurer.

The plaintiff bases his claim upon the fact that the property was sold immediately after the expiry of the time-limit, to Grant, and the property had been introduced to Grant's consideration by him.

The negotiations leading to the sale to Grant and his confrère were quite independent of any negotiations between the plaintiff and Grant. The case is not one where the owner is endeavouring to defeat the agent's right, by himself taking up and concluding negotiations with a purchaser found by the agent. It differs in many important respects from the reported cases.

The point which appears to me to be vital is, that the plaintiff's right must rest upon his contract. The agreement which he made was one which entitled him to a commission if he procured a purchaser by the time limited. In this he failed; and the parties were, therefore, entirely at large, so far as any contractual or other relationship is concerned.

The mere finding of a purchaser is not enough; there must be a contract to pay; and the terms of the contract, including all limitations as to time, must govern.

The cases relied upon by the plaintiff do not appear to me to help him. In none of them was there a limitation of time for the finding of the purchaser. *Burchell* v. *Gowrie and Blockhouse Collieries, Limited*, [1910] A.C. 614, was a case of a general

agency. The plaintiff found the purchaser, and was regarded as the efficient cause of the sale, which was negotiated and carried on behind his back by the principal. *Stratton* v. *Vachon*, 44 Can. S.C.R. 395, is upon precisely the same lines, affirming the right of the agent to his commission when he brings the parties into relation and a contract ultimately results. Again there was no time-limit.

This is quite apart from the alternative defence suggested by the defendants here, that, upon the facts, the plaintiff could not be regarded as having in any way brought about this particular sale. The plaintiff's suggestion to Grant was to take a $5,000 interest in a $50,000 purchase; the plaintiff to supply the capital to take up the remaining shares. The transaction which was carried out was a sale to Grant, and to another with whom the plaintiff had no connection, of the entire property, for the $50,000. The plaintiff was not instrumental in any way in bringing this about, and is not in fairness entitled to claim commission upon this transaction.

Rice v. *Galbraith*, 2 D.L.R. 859, 26 O.L.R. 43, indicates that my brother Latchford had present to his mind what seems to me to be the vital point in this case, when he says, in deciding in the plaintiff's favour there, "No limit as to time was imposed when authority to find a purchaser was given."

Action dismissed with costs.

Action dismissed.

LEFEBVRE v. TRETHEWEY SILVER COBALT MINE Limited.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. June 28, 1912.

1. EVIDENCE (§ XII D—928)—SUFFICIENCY OF PROOF OF NEGLIGENCE CAUSING DEATH.

In an action for negligently causing death, it is necessary that there be reasonable evidence from which it may be inferred that death was due to negligence, since it cannot be inferred from mere conjecture, yet it is not necessary that the manner of its occurrence should be shewn to a demonstration.

[*Evans* v. *Astley*, [1911] A.C. 674, specially referred to.]

2. EVIDENCE (§ II D—108)—PRESUMPTION AS TO NEGLIGENCE—EMPLOYEE FOUND DEAD—WORKING NEAR IMPROPERLY INSULATED ELECTRIC WIRES—WARNING.

That death was caused by negligence of a master may be inferred, where there were no eye-witnesses, from the fact that a careful and experienced painter was required to work in a cramped and insecure position on a scaffold within a few inches of improperly insulated and protected wires carrying a dangerous current of electricity, notwithstanding that he had been warned of their dangerous nature, where the painter's death resulted from contact with the live wire.

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LEFEBVRE v. TRETHEWEY SILVER COBALT MINE LIMITED.

3. MASTER AND SERVANT (§ II A 4—66b)—LIABILITY OF MASTER FOR DEATH OF EMPLOYEE—IMPROPERLY INSULATED ELECTRIC WIRES—DIRECTION OF MASTER.

A judgment for the plaintiff for negligently causing the death of a servant, will be sustained where the evidence justified the jury in finding that the deceased, a painter, who was free from contributory negligence, was not properly warned of the danger from highly charged and imperfectly protected electrical wires located within a few inches of the place where he was required to work on a narrow scaffold, that no notice of the dangerous character of the wires was posted, and that the deceased was directed by his master to work at the place where he met his death, and if he had been warned to keep away therefrom, such warning was overridden by subsequent directions.

Statement

APPEAL by the defendants from the order of a Divisional Court of the 30th November, 1911, dismissing the defendants' appeal from the judgment of Falconbridge, C.J.K.B., at the trial, upon the findings of a jury, in favour of the plaintiffs, the widow and children of Albert Lefebvre, a painter, in an action, under the Fatal Accidents Act, to recover damages for his death by contact with a live wire, while working for the defendants, by reason, as alleged, of their negligence.

The appeal was dismissed.

McGregor Young, K.C., for the plaintiffs.

M. K. Cowan, K.C., for the defendants.

Garrow, J.A.

The judgment of the Court was delivered by GARROW, J.A.:—The deceased was engaged upon a scaffold in painting a building owned by the defendants, in the immediate vicinity of certain wires carrying a high voltage of electricity, with which he came in contact and was killed. No one actually saw the accident. When first seen immediately afterwards, the deceased was lying upon the wire, apparently lifeless. He had evidently commenced work, and had painted so far upon one side that it was necessary for him to descend by the ladder by means of which the scaffold was reached, and remove the ladder in order to pass to the other side. He had apparently just accomplished this and got again upon the scaffold when he met with the accident.

The scaffold was about 20 inches wide, and consisted of two loose planks. The board which was to be painted was immediately over the wires.

The deceased had been warned by the master carpenter, Henderson, about the danger of going near the electric wires. "Don't go within two feet of them," Mr. Henderson says, he told him. The warning certainly seems sufficiently definite and emphatic. And that the deceased understood seems probable, for he replied: "That is all right; I understand; I painted all the O'Brien wires and fixtures."

Then on the morning of the accident, the 24th August, 1910, it is clear that something occurred between Lefebvre and Me-

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Naughton, the defendants' manager. McNaughton says that Lefebvre met him near the building, and, "pointing up to the fascia board, said, 'Will I paint that?' and I said, 'No.' He says 'No?' I said 'No—you keep on to the machine shop where you were painting;' and that was all that passed." They were seen talking, apparently about the board, by two other witnesses, Stocker and Dempster, but they could not hear what was said. The evidence, however, leaves no room for doubt that, within half an hour from the time when Lefebvre had been thus warned by McNaughton not to paint, he had brought his paint pot and brush and had painted part of the board, and been killed by the wires.

The very fair, clear, and careful charge of the learned Chief Justice left nothing to be desired in that direction; and no objection to it was taken by counsel for the defendants.

The jury answered the questions submitted as follows: the death of Lefebvre was caused by the negligence of the defendants; such negligence consisted—"if any instructions were given by McNaughton, same were not properly given so as to be understood by Lefebvre;" scaffolding was such as to render the position of Lefebvre while at work over dangerous high voltage wires unsafe; no notices warning the public or workmen of the danger were posted up; wires were not properly protected or insulated for a sufficient distance from the building; no contributory negligence; Lefebvre was not directed by McNaughton on the morning of the accident not to work at the transformer, but to keep on at the machine shop; Henderson had probably previously warned Lefebvre in a general way, but the warning would be overridden by subsequent instructions given by McNaughton. And they assessed the damages at $4,000, the apportionment to be made by the Court.

Counsel for the defendants now contends, as he contended at the trial, that there was no evidence proper for the jury; that the deceased was acting contrary to orders and in spite of express warnings; and that, in any event, there is no reasonable evidence as to how the contact with the wires occurred.

I am, however, unable to accede to these contentions or any of them. There was, it seems to me, evidence of negligence on the part of the defendants causing the death, which could not have been withheld from the jury. It is not necessary to prove to a demonstration how a death by actionable negligence occurred. See *Evans* v. *Astley*, [1911] A.C. 674, at p. 678. There must, of course, be something more than mere conjecture; in other words, some reasonable evidence from which the necessary inference may be drawn. And such evidence is found, it seems to me, in the conditions under which the deceased was here required to work. Suicide is not suggested. The deceased

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is said to have been both a careful and an experienced man. Intentional contact is, therefore, quite out of the question; and there remains only the probability of accidental contact arising from the cramped and insecure position upon the scaffold in which he required to be to do the work.

This, of course, assumes that he was properly there at the time. And it appears to me that the jury have dealt fairly and intelligently with that, as well as with the other questions. They evidently did not believe McNaughton, which they were quite at liberty not to do, and, indeed, at which I am not much astonished, for his story seems highly improbable, in the light of what occurred immediately afterwards. What seems much more probable is, that he pointed out the board to Lefebvre that morning and told him to paint it while the scaffold was there, which the unfortunate man at once proceeded to do, and in doing so met his death.

I would dismiss the appeal with costs.

Appeal dismissed.

COOPER v. LONDON STREET R. CO.

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May 15.

Ontario Divisional Court, Boyd, C., Teetzel, and Kelly, JJ. May 15, 1912.

1. STREET RAILWAYS (§ III B—26)—DUTY OF RAILWAY COMPANY—USUAL STOPPING PLACE—NEGLIGENTLY RUNNING PAST STATIONARY CAR.

A passenger who had just alighted from a street car which was followed by another, at a point where cars usually stopped to discharge and receive passengers, and where, to the knowledge of the railway company, it was the custom and habit of persons alighting from cars to cross a parallel track in order to reach another street, is not necessarily guilty of contributory negligence, where the fact that another passenger warned the plaintiff, a woman, to look out for the car, might well have flurried and perturbed her, as witnesses said, and led her to lower her head in the face of a strong wind, as she went around the rear of the car from which she had just alighted, and attempted to cross the parallel track where she was struck by a car which was negligently run past the stationary car.

[*Wright v. Grand Trunk R. Co.*, 12 O.L.R. 114, specially referred to.]

2. TRIAL (§ II C [illegible]37)—SUBMISSION OF QUESTIONS TO A JURY—LACK OF CARE IN RUNNING CAR—CAR STATIONARY DISCHARGING PASSENGERS.

The negligence of the defendant street railway company was sufficiently shewn so as to prevent the withdrawal of such question from the jury, where the evidence disclosed that sufficient caution was not observed in running a street car towards a car standing on a parallel track discharging passengers at a street crossing where they were regularly discharged and received, and where, to the knowledge of the company, it was the habit or custom of passengers to cross a parallel track in order to reach another street, and that the car struck and injured the plaintiff, who had just alighted from the stationary car, and without noticing the car approaching from the opposite direction, passed around the rear of the standing car and stepped upon the parallel track.

[*Brill v. Toronto R. Co.*, 13 O.W.R. 114, distinguished.]

Statement

APPEAL by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., upon the findings of a jury, in favour of the

plaintiff, in an action for damages for injuries sustained by being struck by a car of the defendants, after she had alighted from another car, and was attempting to cross the track.

The appeal was dismissed.

I. F. Hellmuth, K.C., for the defendants.

Sir George Gibbons, K.C., for the plaintiff.

The judgment of the Court was delivered by BOYD, C.:—I think this case could not properly have been withdrawn from the jury, and I am not prepared to dissent from the conclusion reached by the jury and favourably viewed and acted upon by the Chief Justice. The situation of the plaintiff at the rear of the car from which she had got out, with a car approaching her on the same track, coupled with the warning given by one on the car she had left to look out for the car, may well have flurried and perturbed her, as the witnesses say, and have led her, in the face of a strong wind, to lower her head and hurry across the track to her place of destination, not observing the coming upon her on the track she was crossing of the other car which was passing the stationary car. Upon this state of facts, the jury may have rightly absolved from contributory negligence: see *Wright* v. *Grand Trunk R. Co.*, 12 O.L.R. 114.

On the question of negligence by the company there was also evidence which ought not to have been withdrawn from the jury. The reception of this evidence by an expert from Hamilton was not objected to, and the effect of it was to indicate that sufficient caution was not observed in approaching this place of crossing the street, at which the car carrying the plaintiff stopped regularly for the discharge and reception of passengers. There was proved to be a habit or custom of those leaving the cars to cross the tracks at that point to get to Albert street, and this practice was well known to the company. If the view was obscured by the stationary car to the conductor of the oncoming car, that was a strong reason for slackening the speed and exercising conformable caution in the view of probable danger at that crossing. And the jury have found negligence in running the south-bound car at too high a rate of speed, when the north-bound car was standing and passengers getting off.

Brill v. *Toronto R. Co.*, 13 O.W.R. 114, is distinguishable from this, in that a duty was cast on the car approaching the place of crossing taken by the passengers for Albert street to go slow while the passengers were being discharged.

I would affirm the judgment with costs.

Appeal dismissed.

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May 14.

BUTLER v. BANK OF OTTAWA.

Saskatchewan Supreme Court, Before His Honour Judge Rimmer, Local Master at Arcola, May 14, 1912.

1. COSTS (§ I—11a)—THIRD PARTY PROCEEDINGS—RIGHT TO RECOVER—DISCONTINUANCE BY PLAINTIFF.

Costs incurred by a defendant in obtaining leave to issue and take out a necessary third party notice, may be taxed by the taxing officer where the plaintiff, before trial, discontinues his action without leave, and the propriety and reasonableness of such costs, and the fact that they were reasonably and properly incurred, will be assumed in the absence of material to the contrary.

[*Harris* v. *Leatner*, 16 Ch. D. 559, specially referred to.]

Statement

APPLICATION by defendants to review the taxation of their costs of defence upon a discontinuance being filed by the plaintiff.

E. J. Brooksmith, for the defendants.

A. E. Vrooman, for the plaintiff.

Rimmer, L.M.

RIMMER, L.M.:—The items disallowed by the taxing officer against the objection of the defendants are costs of obtaining leave to issue and taking out a third party notice. In the absence of an order of the Court or a Judge dealing with these costs, which order it is exceedingly doubtful that a Local Master can make, in view of the provisions of rule 620 (i), I hold that the taxing officer was wrong in principle in disallowing these items because there was no order.

The case, as the plaintiff admits, has not reached trial; and, therefore, rule 80, under which the Court or a Judge may decide all questions of costs between a third party and the other parties to the action, has not been invoked; and its application is doubtful. The question before the taxing officer was not one of the costs of the third party, but solely one of the defendants' costs on the plaintiff's notice of discontinuance without leave.

The only rule applicable was rule 249, under which the plaintiff discontinued his action, which rule provides: "And thereupon he shall pay such defendant costs of action . . . Such costs shall be taxed, and such discontinuance shall not be a defence to any subsequent action."

The principle in the Supreme Court in England is, "that the costs of all work, reasonably and properly and not prematurely done, down to the time of any notice which stops the work, are allowable; and that the taxing officer, having regard to the circumstances of each case, must decide whether the work was reasonable and proper and the time for doing it had arrived:" *Harrison* v. *Leatner*, 16 Ch. D. 559.

While there is no doubt that the third party is not brought in directly by the plaintiff, and a claim over or against him by the defendant appears to be in the nature of another action,

there is, I think, no doubt, on the decisions, that the third party is a party to the action, and as such party he is liable to or may recover costs according to the event. See the judgments of Jessel, M.R., in *Hornby* v. *Cardwell*, 8 Q.B.D. 329, at p. 335; Kay, J., in *Filler* v. *Roberts*, 21 Ch. D. 198, at p. 201; Lindley, L.J., in *Edison and Swan United Electric Co.* v. *Holland*, 41 Ch. D. 28. See, too, *Blore* v. *Ashby*, 42 Ch. D. 682.

Had the action been tried, the defendants and third party, as successful parties, would have recovered costs. By the action of the plaintiff in suing the defendants, the defendants were, so far as the Court has reason to judge, compelled to bring in the third party in self-protection; and, by the action of the plaintiff in discontinuing, the costs of his so doing have been thrown away. Compare *Dawson* v. *Sheppard*, 28 W.R. 805, 42 L.T. 611.

Further, the plaintiff, by discontinuing before the trial, has deprived the Court of material necessary to the exercise of discretion. Compare *The J. H. Henkes*, 12 P.D. 106, at p. 107.

The rule must be so applied that the plaintiff will pay the defendant's costs, reasonably and properly incurred; and, in the absence of material, the assumption is, that costs were reasonably and properly incurred.

The defendant's costs of the action include, in my judgment, the costs incurred in adding or by reason of the addition of necessary parties. I refer the bill for taxation on these principles. Costs of the application to the defendants.

Re-taxation ordered.

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Feb. 23.

New Brunswick Supreme Court, Barker, C.J., Landry, White, Barry, and McKeown, JJ. February 23, 1912.

1. NEW TRIAL (§ II—7)—IMPROPER ADMISSION OF EVIDENCE—MISDIRECTION—SUPREME COURT ACT, C.S. (N.B.), CH. 111, SEC. 376.

Under sec. 376 of ch. 111 of the Supreme Court Act, C.S. (N.B.) 1903, that Court will not grant a new trial of an action appealed from the County Court in which but a trifling amount is in dispute, on the ground of misdirection or improper admission or rejection of evidence, unless substantial wrong or miscarriage was thereby occasioned.

[*Jenkins* v. *Morris*, L.R. 14 Ch.D. 674, specially referred to.]

Statement

COUNTY Court appeal. Action to recover balance due for wages. Tried before His Honour Judge Wilson, Judge of the York County Court, and a jury at the January term, 1911. Verdict entered for the plaintiff for $21, the amount claimed. A motion was made to Judge Wilson to set aside the verdict and grant a new trial, but was refused. The present appeal was taken from that decision and was dismissed. The following is the judgment appealed from:—

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Judge Wilson.

WILSON, COUNTY JUDGE:—This was an action tried before a Judge with a jury at the last January term of this Court and was brought to recover a balance claimed to be due for work and labour performed by the plaintiff for the defendant and resulted in a verdict for the plaintiff for $21.

The facts of the case are as follows: The plaintiff worked for defendant during the winter of 1910 in the lumber woods at the rate of $1.40 per day, and finished about the last day of February, when a settlement of the winter's work was made.

On the third day of March, according to the evidence of the plaintiff, it was agreed between him and the defendant that he should resume work for him at the same rate of wages ($1.40) per day until stream driving began, when he was to get $2.50 per day. He worked in all 15 days until that time at $1.40 per day, and worked on the stream 30 days at $2.50 per day, all of which amounted to $96. He received on account $75. Balance due, $21, to recover which this action was brought.

A summons was taken out calling upon the plaintiff or his attorney to shew cause why the verdict should not be set aside and a new trial granted on the following grounds:—

1st. Improper admission of evidence offered by the plaintiff.
2nd. Improper rejection of evidence offered by defendant.
3rd. Improper instructions to the jury.
4th. Refusal of Judge to instruct the jury as requested by counsel for defendant.
5th. Failure of the Judge to inform the jury as to the law governing settlement of accounts.
6th. Verdict against evidence.
7th. Verdict against law.
8th. Verdict against both.

As to the first grounds: One of the items of the plaintiff's claim was a charge for time spent by him while going from the place where he was working for the defendant to the drive on the Tobique River. The plaintiff's counsel offered evidence to establish a custom which he claimed had the force of law on that river, by which operators always paid their drivers from the time of hiring to the time of the beginning of the drive. I admitted the evidence, being of the opinion that whether such a custom existed or not was a question of fact to be established by evidence. Whether the testimony offered was sufficient to establish it was another thing.

Second, rejection of evidence: The defendant in his evidence produced what he called a time bill, which he claimed to have been used at the settlement between the parties to this suit at the conclusion of the driving operations. He said his brother had charge of the work and the signature was attached to this bill, but the defendant could not say that the name of the employee mentioned therein was that of the plaintiff in this suit.

This paper was placed in the plaintiff's hands on the examination and he said he could not read a mite and did not know whether it was used at the settlement or not.

The defendant was asked: "Did you direct your clerk where to get this bill?" This question was objected to and ruled out, for it appeared to me that the paper was worthless as evidence in view of the absence of proof that it had ever been brought to the attention of the plaintiff at the settlement or that he was connected with it in any way, and the directions as to its procurement could avail nothing.

The learned counsel for the defendant seemed to be of the opinion that because the defendant directed his clerk to get this time bill from his office where his business papers were kept, that that made it evidence.

3rd. Misdirection: According to a memo of my charge to the jury I pointed out what in law would be a settlement of accounts between the parties and it was for them to say under evidence whether a settlement took place between the plaintiff and defendant at the conclusion of the driving operations, and if they so concluded, the payment of part of what was found due the plaintiff would not preclude him from receiving the balance, even though he agreed to accept it in full: *Weldon* v. *Vaughan*, 18 N.B.R. 70. See also *Pitfield* v. *Kimball*, 25 N.B.R. 193. I also told the jury if they considered that the evidence warranted it they could allow the plaintiff $1.40 per day from the time of the second hiring to the time the driving began, including the time going thereto, and that amounts claimed by the defendant as offsets could not be allowed on account of the absence of a plea on the record to that effect.

To charge the jury as requested by the learned counsel for the defendant would, in my opinion, be contrary to the law which governs accord and satisfaction and the practice which requires the defence of set-off to be specially pleaded. A new trial is refused.

The defendant appealed from the above judgment.

Argument

T. J. Carter, K.C., for the defendant, in support of the appeal:—The plaintiff is claiming 30 days' wages at $2.50. Our claim was that the rate agreed upon was $2 per day. He also claims 15 days' labour at $1.40. The dispute on this item was as to one day during which the plaintiff was going up to the drive and not working. We say the Judge withdrew this question from the jury. We also claimed that certain items of supplies furnished to the plaintiff should have been credited on this account, but the Judge charged the jury that they could not allow these items because no set-off had been filed. These supplies are treated among lumbermen in the same way as cash. The

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plaintiff attempted to prove a custom to pay them for their time in travelling to the drive.

[BARKER, C.J.:—A custom must be of such a public and general nature that the parties must be taken to have it in mind in making their contract.]

Carter, K.C.:—We put in evidence certain time bills, which were handed in by the plaintiff in order to get his pay. I claim that possession of these bills is evidence of payment, just as there is a presumption that a note in the hands of a maker has been paid. The Judge refused to allow evidence that these bills were regularly on file in the defendant's office: *Kirchner* v. *Venus*, 12 Moo. P.C. 361.

P. J. Hughes, for the respondent (plaintiff), *contra*:—There is no appeal here because no question of law is involved: County Court Act, C.S.N.B. 1903, ch. 116, sec. 80. As to the time bills, there was no evidence whatever that they referred to the plaintiff. The defendant said there were other Westells, and in fact on their face they shew that they do not refer to this plaintiff, because some of them are for 75 cents per day. There is no evidence that the time bills were ever in the plaintiff's hands. In regard to the custom, there is some evidence of custom here. All lumbermen are presumed to know the customs in the lumbering business: *A. J. Tower Co.* v. *Southern Pacific Co.*, 184 Mass. 472. In any event it is clear that no substantial wrong or miscarriage of justice has occurred. The amount in dispute is trifling.

The judgment of the Court was delivered by

Barker, C.J.

BARKER, C.J.:—Appeal from the County Court of York. The action was for the recovery of $21 as a balance due for wages. It was tried with a jury and a verdict was given for the sum claimed. On behalf of the respondent, Westell, it was urged that there was no appeal, as there was no question of law involved. In my view it is not necessary to discuss that question, as I think the appeal must be dismissed on other grounds. It may be that other questions arose during the trial, but the only important point in dispute was as to the amount, and so far as I can tell from the evidence returned here, the difference between the parties is a very trifling sum. Under the Supreme Court Act C.S. 1903, ch. 111, sec. 376, this Court was prevented from granting new trials on the ground of misdirection or the improper admission or rejection of evidence unless in the opinion of the Court some substantial wrong or miscarriage had thereby been occasioned in the trial of the action. That rule or practice was incorporated into the County Court by sec. 78 of the County Courts Act, C.S. 1903, ch. 116. Sec. 376 of the Supreme Court Act was originally copied from an English judicature rule and it stands now as O. 39, R. 6, of our judicature rules, as well as

the English ones. In *Shapcott* v. *Chappell*, 12 Q.B.D. 58, it was held that that rule governed the Court in disposing of appeals from the County Court, although by its terms it was not made applicable to County Court actions. I find from the report of the County Court Judge's reasons given for refusing a new trial, that he did not think there had been either misdirection or improper admission or rejection of evidence, and in that case there was no reason for applying the rule in question. So far as I have been able from the return to ascertain what the reasons were, I am disposed to agree with them. There seems to be ample evidence to sustain the verdict, and even if there were some grounds for the appellant's contention, I should think he had sustained no substantial wrong or miscarriage and that the verdict ought not to be disturbed: *Jenkins* v. *Morris*, 14 Ch.D. 674, *per* Jessel, M.R., at p. 684.

Appeal dismissed with costs.

HENDERSON v. McGINN.

Alberta Supreme Court. Trial before Beck, J. May 22, 1912.

1. REFERENCE (§ I—4*a*)—WHAT REPORT MUST SHEW—DISSOLUTION OF PARTNERSHIP.

The report of the clerk of the Court on a reference to him of the account of a receiver in an action for the dissolution of a partnership, must shew particularly: (1) the cash, (2) the outstanding assets, (3) the partnership liabilities, distinguishing between secured and unsecured, and those admitted, proved or disputed, (4) the individual liability of each partner for partnership debts, (5) the account between each partner and the firm, (6) the accounts of the receivers and of any auditor appointed to take the partnership accounts, (7) the interest of either partner in a mortgage on partnership land, and (8) the specific charges against the interest of each.

Statement

THIS is an action for a dissolution of a partnership and for an account.

The action was referred back to the clerk of the Court to make further report.

E. B. Williams, for plaintiff.

F. D. Byers, for defendant.

Beck, J.

BECK, J.:—On the 17th March, 1911, an order was made *inter alia* appointing W. C. Inglis, receiver and manager of the partnership business, and referring it to the clerk to take the following accounts and make the following inquiries:—

(*a*) An inquiry of what the credits, property and effects now belonging to the said partnership consist.

(*b*) An inquiry to settle and ascertain the names of the creditors of the said firm and the amounts due to them respectively.

(*c*) An inquiry as to the priorities of claims of creditors of the said firm of McGinn & Henderson.

(*d*) Such other inquiries as it may hereafter be ordered by this Court.

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In furtherance of and as ancillary to this order, I made an order on the 13th April, by consent, referring it to A. H. Allan, an accountant, to take the partnership accounts as an auditor, making such inquiry as he might think fit, without taking evidence, and to report to the clerk. This was with the view of having before the clerk as the basis of the account to be taken by him, a statement of which would be *primâ facie* correct but subject to attack by way of surcharge and falsification by either party. The authority for such an order is English order 55, Rule 19: See Seton on Decrees, 5th ed., pp. 324, 568, 655; Daniel on Forms, 5th ed., pp. 510, 805.

In pursuance of this order, Mr. Allan filed a report on the 29th December, 1911, which seems to be sufficiently satisfactory as far as it goes.

By the order of the 17th March, the clerk was authorized to make a preliminary report. This he did on the 27th February, 1912. The receiver having on the 12th March, 1912, filed his account, the clerk on the same day made what purports to be a final report. A motion is now before me to confirm this report and to deal with the action by way of further consideration and further directions. It is impossible to do either in the present position of the matter.

The clerk finds the assets amount to $28,306.01. The making up of this item includes the item (Allan's report), "Realty and fixtures: lots 26 and 27, block 62, plan 1, Strathcona, as per sale, $37,100.00." It appears, however, that this sum is the price at which lots 25, 26, 27, and 28 in block 62, were sold in a mortgage action of Stephens & Mellon against Fuller *et al.*, that $7,420, being twenty per cent. of this amount was paid by the purchaser, one Dalton, to Messrs. Short, Cross & Biggar, solicitors for the plaintiffs, and that a mortgage for the balance, $29,680, was given by Dalton, the purchaser, to whom and on what terms of payment nowhere appears. Stephens & Mellon's mortgage was for a large amount. It does not appear to what amount it has been satisfied by the cash payment, to what share of the Dalton mortgage they are entitled, and whether there are, and if so, what other specific charges against the mortgage. There appear to be some. In other words, what it is essential to know, namely, what this particular asset really and precisely consists of and what is its value, is not reported. Besides this, is appears that of the four lots sold under the mortgage proceedings, "the two outside lots"—which these are I cannot discover—were the property, not of the partnership but of one of the partners, *which* I cannot discover, and have been valued by the clerk at $11,140; the remaining two, the property of the partnership, being valued at $21,960. These two sums make but $33,100, the difference, $4,000, has gone astray somewhere. The ultimate

interest of the partnership in this Dalton mortgage ought to be precisely ascertained. It is an outstanding, *i.e.*, an unrealized asset. Cash assets and outstanding assets should be distinguished. There is another outstanding asset: "Accounts receivable as per list: $1,003.86." The clerk deducts this because he says the accounts are worthless. It should be left as one of the outstanding assets with the view of making some final disposition of it. The two items:

J. Henderson	withdrawal	$ 271.00
H. McGinn	withdrawal	$1,573.00

I think, are not properly placed among the assets of the partnership. They will come into consideration on the ultimate adjustment of the rights of the partners between themselves. They may for certain purposes perhaps be taken to be assets. That can be determined later. See Lindley on Partnership, 7th ed., pp. 432 *et seq.*, 747 *et seq.*

In view of what I have stated with regard to the Dalton mortgage, the statement of liabilities is wrong for it includes the Stephens & Mellon mortgage which has been realized, as well, apparently, as other specific charges originally against the land but now represented by a share in the Dalton mortgage, now capable of being precisely ascertained.

The account of Clark, receiver prior to Inglis, ought to be stated, so as to be finally dealt with, also the account of Inglis, also the account of Allan, the accountant. The clerk will recommend what allowance should, in his opinion, be made in each instance. The debts of the partnership, so far as the assets will extend, must be provided for. There appear to be some such such debts, which as between the partners themselves are chargeable to one or other of them. These items will affect the amounts of the "withdrawals," and must be taken into account in ascertaining the ultimate interest or liability of each partner. There is also the claim of Thomas Anderson as an execution creditor of the defendant McGinn which is charged upon McGinn's ultimate individual interest in the partnership assets. There may be other similar claims.

Until the partnership debts are provided for, the costs of the action cannot be paid out of the partnership assets.

The appointment of a receiver in an action for the dissolution of a partnership and the winding-up of the business and affairs of the firm necessarily involves the payment by the receiver or out of the funds the proceeds of the assets of the partnership of the debts of the firm (Partnership Ordinance No. 7 of 1899, secs. 41, 46). As part of the report of the clerk, there should therefore be a schedule setting forth the claims against the partnership,—first, those that have been proved or are admitted, and secondly, those that are disputed. The latter can be dealt

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with as in an administration action under English order 55, rules 44 *et seq.*

The report of the clerk should therefore cover the following subjects and be accompanied by schedules shewing:—

1. The assets, with particulars, distinguishing between cash and outstanding assets.
2. The liabilities of the partnership, with particulars, distinguishing between those secured and those unsecured, and in the latter case shewing the nature of the security, and in each case distinguishing between the claims proved or admitted as liabilities and those disputed.
3. A statement of which, if any, of the liabilities of the firm, either partner, as between himself and his partner, is liable for.
4. The state of the accounts between each partner and the firm.
5. The state of the accounts of the receiver, and also that of Clark.
6. The account of Mr. Allan, the accountant.
7. A statement of the interest of either partner in the Dalton mortgage.
8. A statement of the specific charges against such individual interest.

Several exceptions were taken to the clerk's finding on particular items in his report. These items will appear under appropriate heads in his new report and it will be more convenient that they should be dealt with on the new report coming before a Judge.

Judgment referring back.

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April 19.

CARR et al. v. CANADIAN PACIFIC R. CO.

Supreme Court of New Brunswick, Barker, C.J., Landry, and McLeod, JJ. April 19, 1912.

1. EMINENT DOMAIN (§ I E—78*a*)—RIGHT ACQUIRED BY RAILWAY COMPANY—ABANDONMENT BY RAILWAY—EASEMENT.

The title to land expropriated for a right of way by a railway company that received a subsidy under 27 Vict. (N.B.), ch. 3, 1864, and 28 Vict. (N.B.), ch. 12, 1865, is, by the provisions of such Acts, limited to an easement merely, and upon abandonment thereof for railway purposes the title reverts to the original owner.

2. TRESPASS (§ I A—5)—WHAT CONSTITUTES—RAILWAY COMPANY LAYING SIDE-TRACK—TAKING POSSESSION OF STRIP NOT OF STATUTORY WIDTH.

A railway company cannot, in an action for a trespass in laying side-tracks on the plaintiff's land, justify on the ground that its predecessor in title, without right, took a strip of land twelve feet wide from that owned by the plaintiff, for part of its right-of-way, which was not, at such place, of the width allowed by statute, and that therefore it became entitled to claim the full ninety-nine feet allowed by statute for a right-of-way, which would include the land on which the side-tracks were laid, since the Court cannot presume that the company, by taking possession of the twelve foot strip, also took possession of the entire ninety-nine feet which it was entitled to expropriate for a right-of-way.

3. LIMITATION OF ACTIONS (§ II G—66)—TRESPASS TO LAND—RAILWAY LAYING SIDE-TRACK—R.S.C. 1906, CH. 37, SEC. 309.

An action against a railway company for a trespass committed by laying side-tracks on the plaintiff's land, is not an action for injuries sustained by reason of the construction or operation of a railway, which must, under sec. 306 of ch. 37, of the Railway Act, R.S.C. 1906, be brought within one year after the cause of action arose.

4. LIMITATION OF ACTIONS (§ II G—66)—CONTINUOUS DAMAGE BY RAILWAY —APPLICATION OF R.S.C. 1906, CH. 37, SEC. 306.

Where an injury or damage caused by the construction or operation of a railway is continuous, the limitation of one year for bringing an action therefor, as prescribed by sec. 306 of the Railway Act, R.S.C. 1906, ch. 37, does not apply.

Statement

MOTION by defendants by way of appeal against the verdict rendered for plaintiff on the trial before White, J., with a jury at the Carleton Circuit, October, 1911. The verdict was for plaintiffs for $1,200. The questions to the jury and the answers thereto are as follows:—

QUESTIONS FOR JURY, BY THE COURT.

1. Between the 19th day of May, 1905, and the 26th day of June, 1906, did the defendant trespass upon the plaintiffs' lands, specified in the statement of claim?

Answer. Yes.

2. If you say "Yes" to the foregoing question then at what sum do you find and assess the damages to which the plaintiffs were entitled, for such trespass or trespasses?

Answer. $200.00.

3. Did the defendant continuously, from the 26th day of June, 1906, down to the commencement of this suit, wrongfully and without right as against the plaintiffs, maintain upon the plaintiffs' land, side tracks, leading from the defendants' main line to their yard?

Answer. Yes.

4. If you say "Yes" to the last question (3) then what damages do you find and assess to the plaintiffs for such trespass.

Answer. $1,000.00.

5. Did the defendant, between the 19th day of May, 1910, and the commencement of this suit (which was on the 19th day of May, 1911) trespass upon the lands of the plaintiffs specified in the statement of claim?

Answer. Yes.

6. If you say "Yes" to the last preceding question (No. 5) then at what sum do you find and assess the damages to which the plaintiffs are entitled for such trespass or trespasses?

Answer. $400.00.

7. Was George Bull, the grandfather of the plaintiffs, at any time during his lifetime, in possession of the land on which are now located the railway side tracks, the maintenance and user of which the plaintiffs complain of as a trespass?

Answer. Yes.

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QUESTIONS BY DEFENDANT'S COUNSEL.

1. When were the sidings in question in this case built?

Answer. 1892, and since.

2. When and how did the plaintiffs, if ever, acquire title to the Bull homestead property?

Answer. By the conditions of the will of George Bull and the deed of the trustee.

3. What is a fair rental for the Bull homestead property as it now is?

Answer. Three hundred dollars per year.

4. What would be a fair rental for the said property if the sidings were removed?

Answer. Four hundred dollars per year.

5. When was the main line of railway now operated by the defendant built through the said Bull property?

Answer. 1871.

6. What was the width of the right-of-way originally acquired by the builders of said railway?

Answer. Fourteen feet.

7. Did not the predecessors in title of the plaintiffs sell to the defendant a tract of land next adjoining to the south and forming part of the Bull homestead property to be used as a railway yard and knowing it was to be so used?

Answer. Yes.

8. Did not the vendors at the time of said sale contemplate that the northern entrance to said yard should be from the defendant's right-of-way in front of the Bull homestead property?

Answer. No.

9. Did not defendant purchase the same relying upon having such entrance?

Answer. No.

10. Is not the present entrance to said yard the only reasonable entrance thereto?

Answer. We do not know.

11. Has not the defendant and its predecessors in title for more than twenty years last past before the nineteenth day of May, A.D. 1911, been in possession of the property now occupied by its tracks in front of the Bull homestead and had to the knowledge of all open and conclusive possession thereof adverse to all subject to the right to the occupiers of the Bull homestead to cross the same?

Answer. In regard to the main line, "Yes" but sidings, "No."

12. Did not the late George Bull in his lifetime grant to the Woodstock Railway Co., the defendant's predecessors in title a right of way of the statutory width of 99 feet or some other and what width across the said homestead property?

Answer. No.

13. Was not a railway pursuant thereto built by them across the same?

Answer. We do not know.

14. What width of land through the Bull homestead property did the railway company take at the time of construction of the railway?

Answer. Fourteen feet.

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15. Has the railway company continued to occupy the same land since such construction or when if at all did it occupy less or more, and how much less or more, at the Bull property?

Answer. No more than the main line until 1892, and since then sufficient for two sidings.

16. Did the Woodstock Railway Company take a right-of-way through the said Bull homestead property at the time of the construction of the said railway?

Answer. There was a right-of-way taken through the Bull homestead property but we do not know by what company.

17. When was said railway built through said property by said company?

Answer. Railway was built through said property in 1871 but we do not know by what company.

Argument

February 15 and 16, 1912. *F. R. Taylor*, for the defendant moved to set aside the verdict for the plaintiff and to enter a verdict for the defendant or for a new trial. The railway has been in actual operation since 1871. The sidings were built in 1892. The Woodstock Railway Company took over this land under the Act 27 Viet. ch. 57. The New Brunswick Railway Company incorporated by 33 Viet. ch. 49, afterwards acquired this land, see Acts 36 Viet. ch. 37 and 40 Viet. ch. 15. The Act 54 Viet. ch. 14 confirms lease from the New Brunswick Railway Company to the Canadian Pacific Railway for 999 years. The expropriation clause in the Act 27 Viet. ch. 57 says that the owner is to be paid if he demands payment. A large part of the land taken by the railway was given to them, and there is no evidence of any demand for payment of this piece. We claim that, under the Act, the Woodstock Railway Company took an absolute title to a strip of land 99 feet in width. The statute vests the title in the railway and gives a right of action to the property holders. The only evidence as to the width of the right-of-way at this point is that it was 99 feet in width. We are only occupying 33 feet. The learned Judge charged that the railway had only an easement. I contend this was misdirection.

The verdict is excessive. The plaintiffs are not occupying the land and the only possible damage to them is decrease in rental value. They were getting about $300 a year before we put in our sidings. Plaintiff's one witness said that an outside rent in Woodstock would be $250 a year for a house like the plaintiff's. The jury found that the rental value was $400, and over a period of six years the damage would be $600. Instead of this, the jury have awarded $1,200. The jury brought in a verdict on one question and although there was no dispute or misunderstanding, they were allowed to go out and change their verdict. I cite the Railway Act, R.S.C. 1906, ch. 37, sec. 306; *Kelly* v. *Ottawa Street R. Co.*, 3 A.R. (Ont.) 616; *McArthur* v. *Northern Pacific R. Co.*, 15 O.R. 733, 17 O.A.R. 86; *Levesque* v.